(16,875.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 298.

NORMAN MARKUSON, APPELLANT,

vs.

N. F. BOUCHER, WARDEN OF THE PENITENTIARY OF NORTH DAKOTA, AT BISMARCK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 23, 1898.

And this complainant further avers that all of said proceedings against this complainant which culminated in said sentence and confinement were had and carried on by the attorney general of said State of North Dakota under and pursuant to the prov sions of sections 7605 of the Revised Codes of said State of North Dakota and of the other statutes of said State of North Dakota concerning and regulating said procedure.

And this complainant avers and says that the said statutes of the State of North Dakota providing for and regulating said proceedings were and are enacted, maintained, and enforced in violation of the Constitution of the United States, and particularly in violation of article five of said Constitution of the United States, in this, that said statutes provide for the charging of a citizen with an
4 infamous crime and proceeding to compel him to answer therefore and to be punished therefor without a presentment or indictment of a grand jury, and that said statutes are further in violation of the sixth article of the Constitution of the United States — America because said statutes deprive an accused in criminal prosecution of a right to trial by an impartial jury of the State and district wherein said crime shall have been com-itted.

That said statutes are further in violation of the Constitution of the United States because *it* permits the trial and conviction of one accused of crime without being confronted with the witnesses against him.

And this complainant further alleges that said judgment and sentence under which complainant is now confined in said penitentiary are in violation of his constitutional rights, in that said judgment and sentence are in conflict with and in violation of the said fifth article of the Constitution of the United States, in that this complainant has been held to answer for an infamous crime and has been sentenced to the State penitentiary of said State of North Dakota and is now undergoing a one year's sentence therein without ever having been presented or indicted by a grand jury and without there ever having been filed against him an information in the nature of such presentment.

This complainant further alleges that he diligently prosecuted his appeal from said judgment and sentence in said district court to the supreme court of said State of North Dakota; that the said supreme court of the said State of North Dakota has lately determined
5 said cause against him and final judgment in said supreme court has been entered against him.

That this complainant is in straightened circumstances; that he is without means or power to prosecute or sue out a writ of error to the Supreme Court of the United States, which said Supreme Court of the United States, as this complainant is informed and believes, is the only tribunal in which said judgment of said State Supreme Court can be reviewed upon appeal or writ of error; that complainant is likewise without means, ability, or capacity to cause said appeal or writ of error to be presented and argued by counsel in said Supreme Court of the United States; that, as complainant is informed and believes, if he had the means and ability to

prosecute said writ of error to said Supreme Court of the United States, the same could not be brought on for hearing or heard or determined by said court prior to the time when said sentence would expire by its terms, and that this complainant is remediless in the premises unless this court shall issue to him its writ of *habeas corpus*.

That this complainant is a citizen of the United States and entitled to all the privileges, rights, and immunities conferred upon such citizens by the Constitution of the United States.

Wherefore complainant prays that the writ of *habeas corpus* of this court issue, addressed to the said N. F. Boucher, as warden of the penitentiary of said State of North Dakota, at Bismarck, in said State, requiring said warden to produce before this court, at a time and place to be fixed in said writ, the body of this complainant, to the end that this complainant may be discharged from such
6 sentence and custody because of the matters and things aforesaid.

NORMAN MARKUSON,
Complainant.

C. D. & THOS. D. O'BRIEN,
St. Paul, Minn., Attorneys for Complainant.

STATE OF NORTH DAKOTA, } ss:
County of Burleigh, }

Norman Markuson, having been by me duly sworn, doth depose and say that he is the complainant above named; that he has heard read the said complaint and knows the contents thereof, and that the same has been subscribed by him, and that said complaint is true to the best of his knowledge and belief.

NORMAN MARKUSON.

Subscribed and sworn to before me this 30th day of December, A. D. 1897.

NELSON F. BOUCHER,
[SEAL.] *Notary Public, Burleigh County, North Dakota.*

Let the writ issue pursuant to the within petition, returnable before me at Fargo, January 24th, 1898, at 10 o'clock a. m.

CHARLES F. AMIDON, *Judge.*

Dated January 3, 1898."

7 Upon the back of said petition and order appear indorsements in words and figures following, to wit:

"# 18. United States district court, district of North Dakota. In the matter of the petition of Norman Markuson for a writ of *habeas corpus*. C. D. & Thos. D. O'Brien, attorneys for petitioner, 212 Globe bldg., St. Paul, Minn. Filed Jan. 3, 1898. J. A. Montgomery, clerk, by E. R. Steele, deputy."

Thereupon, afterwards, to wit, on said 3d day of January, 1898, a writ of *habeas corpus* was issued in said matter; which said writ is in words and figures following, to wit:

"UNITED STATES OF AMERICA, }
District of North Dakota. }

United States District Court.

The President of the United States of America to N. F. Boucher, warden of the State penitentiary, at Bismarck, North Dakota, Greeting:

We command you that you have the body of Norman Markuson, by you imprisoned and detained, as it is said, together with the term and cause of such imprisonment and detention, by whatsoever name the said Norman Markuson shall be called or charged, before the Honorable Charles F. Amidon, judge of the district court of the United States for the district of North Dakota, at the chambers of said Honorable Charles F. Amidon, in the Public building, at Fargo, in said district, on the 24th day of January, 1898, at ten o'clock a. m., and to do and to receive what shall then and there be
8 considered concerning said Norman Markuson; and have you then and there this writ.

Witness the Honorable Charles F. Amidon, judge of the district court of the United States for said district, at Fargo, in
[SEAL.] said district, this 3d day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

J. A. MONTGOMERY, *Clerk.*

C. D. & THOS. D. O'BRIEN,
Attorneys for Petitioner."

Upon the back of said writ appear indorsements in words and figures following, to wit:

"DISTRICT OF NORTH DAKOTA, *ss:*

I hereby certify and return that I executed the writ of *habeas corpus*, of which the above and foregoing is a duplicate, by handing the same to N. F. Boucher, warden of the State penitentiary, personally, at Bismarck, in said district, on the 4th day of January, 1898.

J. E. CRONAN,
U. S. Marshal,
By JNO. YEGEN, *Deputy.*

DISTRICT OF NORTH DAKOTA, *ss:*

I hereby certify and return that on the 3rd day of January, 1898, at Fargo, in said district, I deposited in the mails of the United States, registered, a letter containing a notice of the issuance
9 of the within writ of *habeas corpus*, giving the date and place of the return thereof, addressed to Edward Winterer, State's attorney for Barnes county, Valley City, North Dakota; also at the same time and place and in the same manner a letter containing a similar notice was mailed to John F. Cowan, attorney general, Bismarck, North Dakota; that the receipts for both of said letters,

signed by Edward Winterer and John F. Cowan respectively, acknowledging the receipt of the aforesaid mentioned letters, are hereto attached.

J. E. CRONAN,
U. S. Marshal,
By W. S. DAGGETT, *Deputy.*

18. In the matter of the petition of Norman Markuson for a writ of *habeas corpus.* Writ. Filed Jan. 22, 1898. J. A. Montgomery, clerk, by E. R. Steele, deputy."

9¼ (*Copies of the Registry Return Receipts Referred to Above.*)

Registry return receipt, sent 3, 3, 1898.
Reg. No. 8. From post-office at Fargo, N. Dakota.
Reg. letter. } Addressed to Edward Winterer,
Reg. [parcel.]* } Post-office at Valley City, N. D.

After obtaining receipt below the postmaster will mail this card, without cover and without postage, to address on the other side.

Received the above-described registered { letter. / parcel.
(Sender's name on other side.)

Sign on dotted lines to the right. When delivery is made to other than addressee the name of both addressee and recipient must appear. } E. WINTERER. ....

Erase letter or parcel, according to which is sent.

When the registered letter or parcel accompanying this card is delivered the postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card, without cover, to address below.

A penalty of $300 is fixed by law for using this card for other than official business.

Post-office Department.
Official business.

Stamp here name of post-office
Valley City, N. Dak., Jan. 4, 1898, 7 p. m.
and date of delivery.

9½ Return to:
Name of sender: J. E. Cronan.
Street and number or post-office box: } .....
Post-office at Fargo, county of Cass, State of North Dakota.

[* Word enclosed in brackets erased in copy.]

Registry return receipt, sent 3, 3, 1898.
Reg. No. 9. From post-office at Fargo, N. Dakota.
Reg. letter. } Addressed to J. F. Cowan,
Reg. [parcel.]* } Post-office at Bismarck, N. D.

After obtaining receipt below the postmaster will mail this card, without cover and without postage, to address on the other side.

Received the above-described registered { letter. / parcel.
(Sender's name on other side.)

Sign on dotted lines to the right. When delivery is made to other than addressee the name of both addressee and recipient must appear. } J. F. COWAN. ..... M. J. O. ....

Erase letter or parcel, according to which is sent.

9¾ When the registered letter or parcel accompanying this card is delivered the postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card, without cover, to address below.

A penalty of $300 is fixed by law for using this card for other than official business.

Post-office Department.

Official business.

Post-office at { Stamp here name of post-office | Bismarck, N. Dak., Jan. 4, 8 a. m., 1898, rec'd. | and date of delivery. }

Return to:
Name of sender: J. E. Cronan.
Street and number or post-office box: ....
Post-office at Fargo, county of Cass, State of North Dakota.

Thereupon, afterwards, to wit, on the 25th day of January, 1898, a return to the writ of *habeas corpus* was filed in said matter; which said return is in words and figures following, to wit:

[* Word enclosed in brackets erased in copy.]

"*Return to Writ of Habeas Corpus in Matter of Norman Markuson.*

UNITED STATES OF AMERICA, } ss:
District of North Dakota, }

United States District Court.

To the honorable district court of the United States for the district of North Dakota:

I, N. F. Boucher, the warden of the penitentiary of the State of North Dakota, at Bismarck, of said State, to whom the within writ is directed, have now here before the Honorable Charles F.
10 Amidon, the judge of the said district court of the United States for the district of North Dakota, the body of Norman Markuson, the person in said writ named, as thereby directed and commanded; and I, the said N. F. Boucher, do hereby certify that the cause of the detention of the said Norman Markuson in said State penitentiary is a warrant of commitment, together with a certified copy of judgment and sentence made a part of said commitment, issued by the district court of the fifth judicial district of the State of North Dakota, directed to me, a copy of which is hereto annexed, marked 'Exhibit A,' and made a part hereof.

N. F. BOUCHER,
Warden of the Penitentiary of the State of North Dakota, at Bismarck, said State.

Dated this 24th day of January, A. D. 1898."

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

In District Court, Fifth Judicial District.

THE STATE OF NORTH DAKOTA *ex Rel.* P. J. MCCLORY, Assistant Attorney General, Plaintiff,
vs.
NORMAN MARKUSON ET AL., Defendants.

Proceedings in Contempt.

THE STATE OF NORTH DAKOTA
against
NORMAN MARKUSON, Defendant.

Commitment to State prison.

The State of North Dakota to the sheriff of the county of Barnes and to the warden of the State penitentiary, at Bismarck, in said State, Greeting:

You, the said sheriff, are hereby commanded to deliver to
11 the said warden of said penitentiary the body of Norman Markuson, now in your custody, who was found guilty of

criminal contempt of court and sentenced to be confined and imprisoned in the State penitentiary, at Bismarck, North Dakota, for and during the term of one year from twelve o'clock at noon of the 7th day of December, 1897, as will all appear by a certified copy of the judgment and sentence of the court ordering such imprisonment, hereto attached.

And you, the said warden of said State penitentiary, are hereby commanded to safely keep the said Norman Markuson until the expiration of the said sentence or until he shall be discharged therefrom by due course of law.

Witness the Honorable S. L. Glaspell, judge of the district court of the fifth judicial district, North Dakota, and my hand and the seal of said district court for Barnes county this 13th day of December, 1897.

[Seal District Court, Barnes County, North Dakota.]

(Signed) M. G. CUSHING, *Clerk.*

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

In District Court, Fifth Judicial District.

THE STATE OF NORTH DAKOTA *ex Rel.* P. J. MCCLORY, Assistant Attorney General, Plaintiff,
vs. against
NORMAN MARKUSON, Defendant.

Proceedings in Contempt.

STATE OF NORTH DAKOTA
against
NORMAN MARKUSON.

12 Judgment upon affirmance by the supreme court of judgment in said district court.

Whereas heretofore and on the 6th day of August, 1897, upon due trial herein had, this court found the said defendant, Norman Markuson, guilty of criminal contempt of court provided by section 7605 of the Revised Codes of the State of North Dakota, and that said contempt constituted the second offense of contempt under the said provision of said section 7605 of the Revised Codes of the State of North Dakota; and

Whereas on the said 6th day of August, 1897, this court issued its order in the following words, to wit:

"It is hereby ordered that the judgment and sentence of the court be rendered and pronounced in open court in the presence and hearing of the said defendant, Norman Markuson, and that the clerk enter the same upon the minutes of the court. The judgment and sentence against the said defendant, Norman Markuson, is that

he be imprisoned in the State penitentiary for the State of North Dakota for the period of one year.

Let judgment be entered accordingly.

By the court:

S. L. GLASPELL, *Judge.*

Dated August 6th, 1898.

Attest: M. G. CUSHING, *Clerk.* [SEAL.]"

And whereas on the said 6th day of August, 1897, the said defendant, Norman Markuson, being brought before the court in open court, and being duly sentenced by the court to be confined in the State penitentiary, at Bismarck, for the period of one year, in harmony with the order of said court; and

Whereas the defendant, Norman Markuson, appealed from the judgment and sentence of said district court to the supreme
13 court of the State of North Dakota, and the said supreme court has affirmed the judgment and sentence of said district court and caused a remittitur to be filed in the office of the clerk of the district court on the 7th day of December, 1897:

Now, therefore, upon motion of Edward Winterer, State's attorney for Barnes county, North Dakota, I do hereby further order and direct that the judgment of the supreme court in the case be, and the same is hereby, made the judgment of this court; and I further order and direct that the said defendant, Norman Markuson, be imprisoned in the State penitentiary, at Bismarck, State of North Dakota, for the period of one year from twelve o'clock noon of the seventh day of November, 1897, being the date of filing said remittitur in this court, and that a commitment issue to carry this judgment into effect.

Done this 10th day of December, 1897.

S. L. GLASPELL, *Judge.*

Attest: M. G. CUSHING, *Clerk.* [SEAL.]

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

District Court, 5th Judicial District.

I hereby certify that I have carefully compared the within instrument with the original now on file in this office, and that it is a true and correct copy of the same.

In witness whereof I have hereunto set my hand and official seal this 13th day of Dec., A. D. 1897.

[Seal Clerk Dist. Court, Barnes Co., N. D.]

M. G. CUSHING,
Clerk Dist. Court within and for Barnes Co., N. D.

14 THE STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

In District Court, Fifth Judicial District.

THE STATE OF NORTH DAKOTA *ex Rel.* P. J. MCCLORY, Assistant Attorney General, Plaintiff,
vs.
NORMAN MARKUSON and MICHAEL E. MURPHY, Defendants.

Proceedings in Contempt.

THE STATE OF NORTH DAKOTA
vs.
NORMAN MARKUSON, Defendant.

Information having been made under oath that one Norman Markuson did commit the crime of contempt of court in and by violating the lawful provisions of an injunctional order issued under and pursuant to section 7605 of the Revised Codes of the State of North Dakota, which said information was duly filed in the office of the clerk of this court on the 17th day of June, A. D. 1897, and an attachment for contempt of court having been duly issued by this court, and the said defendant having been arrested and brought before this court, and having been duly arraigned, and having pleaded not guilty to the charge in the said information contained, and thereafter, and on the 3rd and 4th days of August, 1897, the said defendant being duly tried before this court on said charge of contempt of court, Edward Winterer, State's attorney for said Barnes county, and Herbert Root appearing for the State of North Dakota, and Messrs. Marion Conklin and Martin Remmen appearing
15 as counsel for the said defendant, and evidence being offered and produced on the part of the State, and also on the part of the said defendant, said evidence being duly considered by this court, whereupon the court makes and finds the following as its

Findings of Fact.

First. That on the 22nd day of June, 1896, a search warrant was duly issued by the Honorable Roderick Rose, judge of this court, in said case of The State of North Dakota *ex rel.* P. J. McClory, assistant attorney general, plaintiff, *vs.* Norman Markuson and Michael E. Murphy, defendants, directed to the sheriff or any constable or marshal of the county of Barnes, State of North Dakota, commanding such officer to search the following-described premises, lot No. —, in block No. twenty-five, in the original town site of Valley City, Barnes county, North Dakota, and to seize and hold any intoxicating liquors found thereon.

Second. That on said 22nd day of June, 1896, the said Honorable Roderick Rose issued a temporary injunctional order in the above cause, among other things enjoining and restraining the said defendants, Norman Markuson and Michael E. Murphy, their agents,

attorneys, and servants, in case the officer serving the said search warrant and said injunctional order should seize and take possession of said premises or any personal property found therein, from in any way interfering with said premises or said personal property, or any part thereof, after such possession should be taken by such officer, or from in any way disturbing the possession of such officer.

Third. The said search warrant and injunctional order were duly and personally served upon said defendant, Norman Markuson, in Valley City, Barnes County, North Dakota, on the 26th day of June, 1896, by one Hans O. Hagen, a duly qualified and acting constable of the said Barnes county.

16

Fourth. That the said officer, Hans O. Hagen, after serving the the said search warrant and the said injunctional order, took possession of the said premises and certain personal property found thereon, to wit, beer.

Fifth. That after the service of said search warrant and injunctional order upon the said defendant, Norman Markuson, and after the possession of the said premises and said personal property was taken by said officer, and while the said injunctional order was in full force and effect, the said defendant, Norman Markuson, with force and violence rescued and retook possession of the said premises and said personal property and removed and carr-ed away said personal property, to wit, a large quantity of beer, from the said premises and from the possession of the said officer.

Sixth. That the said defendant, Norman Markuson, was tried, found guilty, and convicted on the 29th day of June, 1895, for violating the lawful provisions of a certain injunctional order issued by the judge of this court under and pursuant to section 13 of chapter 110 of the Laws of 1890 of the State of North Dakota, being section 7605 of the Revised Codes of said State.

Conclusions of Law.

From said findings of fact the court makes the following as the conclusions of law:

That the said defendant, Norman Markuson, is guilty of criminal contempt of court as provided by section 7605 of the Revised Codes of the State of North Dakota, and that the said contempt is and constitutes the second offense of contempt under and against the provisions of said section 7605 of the said Revised Codes of the State of North Dakota.

17

Order for Judgment.

Pursuant to the facts found in the trial of the above-entitled cause by this court and its conclusions of law adduced therefrom, and on motion of Edward Winterer, State's attorney for Barnes county, North Dakota, and Herbert Root, assistant and special counsel, appearing for the State of North Dakota—

It is hereby ordered that the judgment and sentence of the court be rendered and pronounced in open court, in the presence and hear-

ing of the said defendant, Norman Markuson, and that the clerk enter the same upon the minutes of the court.

The judgment and sentence against the said defendant, Norman Markuson, is that he be imprisoned in the State penitentiary for the State of North Dakota for the period of one year.

Let judgment be entered accordingly.

By the court:

S. L. GLASPELL, *Judge.*

Dated August 6th, 1897.

Attest:

[SEAL.] M. G. CUSHING, *Clerk.*

And on the said 6th day of August, 1897, the said court, in the presence and hearing of the said defendant, Norman Markuson, and in open court, pronounced sentence upon the said defendant as follows, to wit:

"COURT: Mr. Markuson, in this case the court finds you guilty of the charge in the information, and that it is the second
18 offense. Have you any legal reason why sentence of the court should not be passed upon you at this time?

MARKUSON: No, sir.

It is the judgment and sentence of the court that you, Norman Markuson, be confined in the State penitentiary, at Bismarck, for a period of one year. You are committed to the custody of the sheriff."

The said defendant having appealed from the judgment and sentence of the said court to the supreme court of the State of North Dakota, and the said supreme court having affirmed the said judgment and sentence of the said district court, and the remittitur in said cause being filed in the office of the clerk of this court on the 7th day of December, 1897, that the said judgment and sentence be carried into effect.

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

District Court, 5th Judicial District, ss:

I hereby certify that I have carefully compared the within instrument with the original now on file in this office, and that it is a true and correct copy of the judgment and sentence in the above cause.

In witness whereof I have hereunto set my hand and official seal this 13 day of Dec., 1897.

[Seal Clerk Dist. Court, Barnes Co., North Dakota.]

M. G. CUSHING,
Clerk D-st. Court within and for Barnes Co., N. D.

VALLEY CITY, N. D., *Dec.* 13, 1897.

I hereby certify that the foregoing judgment and sentence are full

and correct copies of the judgment and sentence now on file
19 in the office of the clerk of the district court, Barnes county, N. D., in the matter of the State of North Dakota *vs.* Norman Markuson.

(Signed) CHAS. A. POLLOCK,
Judge District Court, 3rd Dist., Acting upon the Written Request of Hon. S. L. Glaspell, Judge Dist. Court, 5th Dist., of the State of North Dakota.

Attest: M. G. CUSHING, *Clerk.*

[Seal Clerk Dist. Court, Barnes County, N. D.]

"UNITED STATES OF AMERICA, }
District of North Dakota. }

United States District Court.

The President of the United States of America to N. F. Boucher, warden of the State penitentiary, at Bismarck, North Dakota, Greeting:

We command you that you have the body of Norman Markuson, by you imprisoned and detained, as it is said, together with the term and cause of such imprisonment and detention, by whatsoever name the said Norman Markuson shall be called or charged, before the Honorable Charles F. Amidon, judge of the district court of the United States for the district of North Dakota, at the chambers of said Honorable Charles F. Amidon, in the public building at Fargo, in said district, on the 24th day of January, 1898, at ten o'clock a. m., to do and to receive what shall then and there be considered concerning said Norman Markuson; and have you then and there this writ.

Witness the Honorable Charles F. Amidon, judge of the
20 district court of the United States for said district, at Fargo, in said district, this 3d day of January, in the year of our
[SEAL.] Lord one thousand eight hundred and ninety-eight.

J. A. MONTGOMERY, *Clerk.*

C. D. & THOS. D. O'BRIEN,
Attorneys for Petitioner."

Upon the back of said return appear indorsements in words and figures following, to wit:

"# 18. Writ of *habeas corpus.* Norman Markuson *vs.* N. F. Boucher. Returned and filed January 25th, 1898. J. A. Montgomery, clerk, by W. S. Daggett, deputy."

Thereupon, afterwards, to wit, upon said 25th day of January, 1898, the following order was made in said matter, as appears of record upon the journal of the court, at page #1796; which said order is in words and figures following, to wit:

"In the Matter of the Petition of NORMAN MARKUSON for a Writ of *Habeas Corpus.*

Comes now N. F. Boucher, as warden of the North Dakota State penitentiary, *of* Bismarck, North Dakota, and makes return to the writ of *habeas corpus* heretofore issued herein, with the body of said Norman Markuson in his custody, at the bar of this court. Said N. F. Boucher moves the court to quash the petition filed herein and dismiss the writ of *habeas corpus* heretofore issued herein; and said motion to quash having been argued and submitted to the court, now, after due consideration, it is—

Ordered that said motion to quash be, and the same hereby is, overruled."

21 And comes now said petitioner, by his attorney, C. D. O'Brien, Esq, and asks leave to file an amended petition; which motion is granted by the court, and after hearing arguments of the respective counsel the court continues the hearing until tomorrow morning at ten o'clock.

Thereupon, afterwards, to wit, on said 25th day of January, 1898, an amended petition was filed in said matter; which said amended petition is in words and figures following, to wit:

"United States District Court, District of North Dakota.

In the Matter of the Petition of NORMAN MARKUSON for a Writ of *Habeas Corpus.*

To the honorable the district court of the United States above named:

The petition and amended complaint of Norman Markuson respectfully shows and states to the court that this complainant is now confined in the State penitentiary of North Dakota, at Bismarck, in said State, and in custody of the warden of said penitentiary, N. F. Boucher; that this complainant has been so confined in said penitentiary since the 7th day of December, 1897, and he is therein confined under and pursuant to a certain pretended commitment issued out of the district court of the fifth judicial district of the said State of North Dakota in and for the county of Barnes, in said State.

22 That said commitment was made and issued under and pursuant to a certain pretended judgment and sentence of said district court of said State, made and entered in said court in certain proceedings had therein, wherein the State of North Dakota on the relation of P. J. McClory, assistant attorney general, was plaintiff and this complainant was defendant, and in and by the terms of which said judgment and sentence this complainant was sentenced to be imprisoned in the State penitentiary of the said State of North Dakota for the period of one year.

That thereafter and on the 6th day of August, 1897, this complainant perfected an appeal to the supreme court of the State of

North Dakota from said judgment and sentence, being in the meantime by said district court admitted to bail. That thereafter said cause duly came on for hearing in the supreme court of the said State of North Dakota, and such proceedings were duly had therein that said supreme court affirmed in all things the said judgment, conviction, and sentence of this complainant. Whereupon this complainant was, as is hereinbefore stated, on the 7th day of December, 1897, committed to said penitentiary and is now confined therein, as aforesaid, undergoing said sentence.

And this complainant further avers that all of said proceedings against this complainant which culminated in said sentence and confinement were had and carried on by the attorney general of said State of North Dakota under and pursuant to the provisions of section 7605 of the Revised Statutes of said State of North Dakota and of the other statutes of said State of North Dakota concerning and regulating said procedure.

23 And this complainant avers and says that the said statutes of the State of North Dakota providing for and regulating said proceedings were and are enacted, maintained, and enforced in violation of the Constitution of the United States, and particularly in violation of article five of the amendments to said Constitution of the United States, in this, that said statutes provide for the charging of a citizen with an infamous crime and proceeding to compel him to answer therefor and to be punished therefor without a presentment or indictment of a grand jury, and that said statutes are further in violation of the sixth article of the amendments to the Constitution of the United States of America, because said statutes deprive an accused in criminal prosecution of a right to trial by an impartial jury of the State and district wherein said crime shall have been committed.

That said statutes are further in violation of the Constitution of the United States, because it permits the trial and conviction of one accused of crime without being confronted with the witnesses against him.

That said statutes and the proceedings had thereunder and by which this complainant was convicted and imprisoned, as aforesaid, are further in violation of the constitutional rights of this complainant, as provided and enacted in section 1 of the fourteenth amendment of the Constitution of the United States, in this, that said statutes and the proceedings had thereunder operate and do abridge the privileges and immunities of citizens of the United States and deprive such citizens of liberty and property without due process of law, in that they deny to such citizens upon a criminal trial

24 the right of trial by jury, and deny to said citizens within the jurisdiction of North Dakota the equal protection of the laws, in that; that in and by said statutes it is provided that in prosecutions thereunder a conviction for contempt of court may be had without a trial by jury and a defendant sentenced to the penitentiary of said State thereunder, whereas in all other criminal prosecutions the citizens of the United States within said State and all persons being found therein are entitled to a trial by jury; and

further in this, that in such proceedings a contempt of court is punishable as an infamous crime, whereas in all other proceedings a contempt of court is punishable only as and for a misdemeanor.

And this complainant further alleges that said judgment and sentence under which complainant is now confined in said penitentiary are in violation of his constitutional rights, in that said judgment and sentence are in conflict with and in violation of the said fifth article of the amendments to the Constitution of the United States, in that this complainant has been held to answer for an infamous crime and has been sentenced to the State penitentiary of said State of North Dakota and is now undergoing a one year's sentence therein without ever having been presented or indicted by a grand jury and without there ever having been filed against him an information in the nature of such presentment.

This complainant further alleges that he diligently prosecuted his appeal from said judgment and sentence in said district court to the supreme court of said State of North Dakota; that the said supreme court of the said State of North Dakota has lately determined
25 said cause against him, and final judgment in said supreme court has been entered against him.

That this complainant is in straightened circumstances; that he is without means or power to prosecute or sue out a writ of error to the Supreme Court of the United States, which said Supreme Court of the United States, as this complainant is informed and believes, is the only tribunal in which said judgment of said State supreme court can be reviewed upon appeal or writ of error; that complainant likewise is without means, ability, or capacity to cause said appeal or writ of error to be presented and argued by counsel in said Supreme Court of the United States; that, as complainant is informed and believes, if he had the means and ability to prosecute said writ of error to said Supreme Court of the United States the same could not be brought on for hearing or heard or determined by said court prior to the time when said sentence would expire by its terms, and that this complainant is remediless in the premises unless this court shall issue to him its writ of *habeas corpus*.

That this complainant is a citizen of the United States, and entitled to all the privileges, rights, and immunities conferred upon such citizens by the Constitution of the United States.

Wherefore complainant prays that the writ of *habeas corpus* of this court issue, addressed to said N. F. Boucher, as warden of the penitentiary of said State of North Dakota, at Bismarck, in said State, requiring said warden to produce before this court, at a time and place to be fixed in said writ, the body of this complain-
26 ant, to the end that this complainant may be discharged from such sentence and custody because of the matters and things aforesaid.

NORMAN MARKUSON,
Complainant.

C. D. & THOS. D. O'BRIEN,
Attorneys for Complainant.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

Norman Markuson, having been by me duly sworn, doth depose and say that he is the complainant above named; that he has heard read the said complaint and knows the contents thereof, and that the same has been subscribed by him, and that said complaint is true, to the best of his knowledge and belief.

NORMAN MARKUSON.

Subscribed and sworn to before me this 25 day of January, A. D. 1898.

W. S. DAGGETT,
Dep. Clerk U. S. District Court, North Dakota. [SEAL.]"

Upon the back of said amended petition appear indorsements in words and figures following, to wit:

"# 18. United States district court, district of North Dakota. In the matter of the petition of Norman Markuson for writ of *habeas corpus.* Amended petition. Filed Jan'y 25, 1898. J. A. Montgomery, clerk, by W. S. Daggett, deputy. C. D. & Thos. D. O'Brien, attorneys for petitioner, 212 Globe bldg., St. Paul, Minn."

27 Thereupon, afterwards, to wit, on the 26th day of January, 1898, the following proceedings were had in said matter, as appears of record upon the journal of the court, at page 1797, in words and figures following, to wit:

"In the Matter of the Petition of NORMAN MARKUSON for a Writ of *Habeas Corpus.*

Comes now Norman Markuson, in the custody of N. F. Boucher, warden of the North Dakota State penitentiary, at Bismarck, North Dakota, and the hearing in said matter being concluded and taken under advisement by the court, it is—

Ordered that the said Norman Markuson shall be and remain in the custody of the marshal of the United States for the district of North Dakota, pending judgment herein and until the final order of this court.

And it is further ordered that a certified copy of this order be served upon the said N. F. Boucher, warden, as aforesaid."

Thereupon, afterwards, to wit, on March 31st, 1898, an order was made in said cause to file as part of the record a copy of the abstract in the case of The "State of North Dakota *vs.* Norman Markuson;" which said order is in words and figures following, to wit:

28 "District Court of the United States, District of North Dakota.

In the Matter of the Petition of NORMAN MARKUSON for His Discharge in a Writ of *Habeas Corpus*.

Upon the hearing of the above-entitled cause counsel for the petitioner offered in evidence in support of the petition a copy of the abstract in the case of The State of North Dakota *ex rel.* Peter J. McClory, assistant attorney general, plaintiff and respondent, *v.* Norman Markuson, informed against with Michael E. Murphy, defendant and appellant, on the appeal of that case to the supreme court of the State of North Dakota, which abstract was received in evidence and was the only evidence offered at said hearing, and it is now—

Ordered that said document be filed by the clerk as a part of the record in the above-entitled cause.

CHARLES F. AMIDON, *Judge*."

Upon the back of said order appear indorsements in words and figures following, to wit:

"#18. U. S. district court. In the matter of the petition of Norman Markuson, etc. Order to file abstract. Filed Mar. 31, 1898. J. A. Montgomery, clerk, by E. R. Steele, deputy."

Thereupon, afterwards, to wit, on the 31st day of March, 1898, a copy of the abstract in the case of The "State of North Dakota *vs.* Norman Markuson" was filed in said matter; which said abstract is in words and figures following, to wit:

29 STATE OF NORTH DAKOTA:

Supreme Court, October Term, 1897.

THE STATE OF NORTH DAKOTA *ex Rel.* P. J. MCCLORY, Assistant Attorney General, Plaintiff and Appellant,
vs.
NORMAN MARKUSON, Informed against with MICHAEL E. MURPHY, Defendant and Appellant.

Information in Contempt.

(Title.)

Edward Winterer, State's attorney in and for the county of Barnes and State of North Dakota, in the name and by the authority of the State of North Dakota, and by virtue of his said office, upon his oath, to the best of his knowledge, information, and belief, lays before the court herein information of the commission of a public offense, viz:

That the crime of contempt of court has been committed by Michael E. Murphy and Norman Markuson, both late of the county of Barnes, in the State of North Dakota, as follows:

On the 10th day of June, A. D. 1896, one Frank L. Kellogg
30 made affidavit that intoxicating liquors, to wit, beer and whiskey, were kept for sale, sold, bartered, and given away as a beverage on the premises known as lot No. four, in block No. twenty-five, in the original town site of the city of Valley City, in the county of Barnes and State of North Dakota, and that to the best of his knowledge, information, and belief Michael E. Murphy and Norman Markuson were conducting said business and making such unlawful sales, and that on the 5th day of June, A. D. 1896, the said affiant, Frank L. Kellogg, had purchased upon said premises intoxicating liquors as a beverage, and had drunk such intoxicating liquors as a beverage on said premises, and prayed that a search warrant might be issued by this court, to the end that said premises might be searched, as provided by law.

On the 16th day of June, A. D. 1896, one P. J. McClory, assistant attorney general of the State of North Dakota, made under oath, to the best of his knowledge, information, and belief, complaint in the name of the State of North Dakota against the aforesaid Michael E. Murphy and Norman Markuson, alleging the existence upon the said above described premises of a common nuisance, where intoxicating liquors were kept for sale as a beverage, and sold and bartered and given away as a beverage, and drunk as a beverage upon said premises, and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and that such common nuisance was so kept and maintained by the said Michael E Murphy and Norman Markuson, and prayed that said nuisence might be abated, and that an
31 injunctional order might be issued by this court, restraining the continuance of said common nuisance pending the determination of the action herein.

On the 16th day of June, A. D. 1896, the said P. J. McClory, assistant attorney general, as aforesaid, caused to be issued in the name of the State of North Dakota a summons against the said Michael E. Murphy and Norman Markuson, as defendandts, commanding them to answer said complaint within the time allowed by law.

On the 22nd day of June, 1896, the Hon. Roderick Rose, judge of this court, upon the aforesaid affidavit issued a search warrant, directed to the sheriff or any constable or marshal of the county of Barnes, in the State of North Dakota, commanding such officer to search said premises and to seize and hold any intoxicating liquors found upon said premises.

On the 22nd day of June, 1896, the said court also issued the temporary injunctional order prayed for in said complaint, enjoining and restraining said defendants, Michael E. Murphy and Norman Markuson, from using or permitting to be used said premises as such common nuisance, and also enjoining and restraining said defendants, their agents, attorneys, and servants, in case the officer serving said affidavit, search warrant, summons, complaint, and injunctional order should take possession of said premises or of any personal property found thereon, from in any way interfering with said prem-

ises or personal property or any part thereof after such possession should be so taken by such officer or from in any way disturbing the possession of such officer.

On the 26th day of June, A. D. 1896, the said affidavit, search warrant, summons, complaint, and injunctional order were placed
32 into the hands of Hans O. Hagen, a duly qualified and acting constable of said county of Barnes, for immediate service.

On the said 26th day of June, A. D. 1896, the said constable, Hans O. Hagen, upon said hereinbefore-described premises duly served upon each of said defendants, Michael E. Murphy and Norman Markuson, the said affidavits, search warrant, summons, complaint, and injunctional order by delivering to and leaving with each of said defendants true copies of each thereof, and proceeded to make search of said premises, as so commanded, and found thereon large quantities of intoxicating liquors, to wit, beer and whiskey, whereupon said constable, Hans O. Hagen, forthwith took possession of said premises and of said intoxicating liquor and other personal property found thereon, and afterwards carefully invoiced the same.

On June 29th, 1895, both said defendants, Michael E. Murphy and Norman Markuson, were convicted in this court of criminal contempt under chapter 110 of the Laws of 1890 of the State of North Dakota.

The said action is still pending in this court and said injunctional order still remains in full force and effect and has not been dissolved, vacated, or modified in any way.

Thereafter, on said 26th day of June, 1896, while said injunctional order still remained in full force and effect and while said constable, Hans O. Hagen, remained in possession of said premises and personal property, he having locked up the same and left it temporarily in charge of Delevan Carlton and Alexander Cummings,
the said defendants, Michael E. Murphy and Norman Marku-
33 son, gathered a large mob of lawless persons to their assistance and with great force and violence broke upon said premises and the building thereon and drove away the said custodians thereof and removed the said intoxicating liquors and rescued said intoxicating liquors from the possession of said constable and assaulted and drove from said premises said constable, thereby disobeying the mandate and violating the said order of this court, whereby this court was and is hindered, obstructed, and embarrassed in the discharge of its duties and in the exercise of its authority, and whereby the administration of justice is delayed and hindered and the authority of this court is brought into contempt, contrary to the form of the statutes for such case made and provided and against the peace and dignity of the State of North Dakota.

Wherefore The State of North Dakota, the plaintiff herein, by the said Edward Winterer, State's attorney as aforesaid, prays that this court do issue an attachment to the sheriff of the county of Barnes, in said State, commanding him forthwith bring them before this court to be dealt with according to law.

EDWARD WINTERER.

W. W. SMITH,

Notary Public for the County of Barnes, State of North Dakota.

34 STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Hans O. Hagen, being first duly sworn according to law, on his oath deposes and says that he has heard read the foregoing information and knows the contents thereof, and that the same is true to his own knowledge.

HANS O. HAGEN.

Subscribed and sworn to before me this seventeenth day of June, A. D. 1897.

W. W. SMITH,
Notary Public in and for the County of Barnes and State of North Dakota.

Attachment.

(Title.)

The State of North Dakota to the sheriff of the county of Barnes, Greeting:

You are hereby commanded to attach Michael E. Murphy and Norman Markuson and bring their bodies forthwith before the judge of the district court for the fifth judicial district and county of Barnes, at the court-house, in said county, to answer certain charges of contempt committed against said court in the manner following, to wit:

That on or about the 22nd day of June, 1896, a certain injunctional order was issued by the Honorable Roderick Rose, judge of this court, in the case of The State of North Dakota *ex rel.* P.

35 J. McClory, assistant attorney general, plaintiff, *vs.* Michael E. Murphy and Norman Markuson, defendants, among other things enjoining and restraining the said defendants, their agents, attorneys, and servants, from using or permitting to be used the building on lot four, in block 25, in Valley City, North Dakota, as a common nuisance, and further restraining and enjoining and restraining said defendants, their agents, attorney-, or servants, in case the said officer serving the said injunctional order should seize and take possession of the said premises or any personal property found thereon, from in any way interfering with the said premises or said personal property or any part thereof after such possession should be taken by such officer, which said order was duly and personally served upon the said defendants on the 26th day of June, 1896, and possession of said premises taken by Hans O. Hagen, the officer serving said order, and also a large amount of beer and whiskey found thereon, and that while said action was still pending, after the service of the said order upon the said defendants and while the same was in full force and effect, on the said 26th day of June, 1896, the said defendants, Michael E. Murphy and Norman Markuson, did wilfully and unlawfully disobey and violate the provisions of said injunctional order by retaking possession of said premises and said whiskey and beer from the custody of said Hans O. Hagen while in

lawful discharge of his duties in obedience to the mandate of this court, and to do further and receive what said court shall then and there consider in this behalf.

Witness the Honorable S. L. Glaspell, judge of said district court aforesaid, at Valley City, in said county, this 17th day of June, A. D. 1897.

[SEAL.] M. G. CUSHING, *Clerk.*

36 *Summons.*

(Title.)

The State of North Dakota to the above-named defendants:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your answer to said complaint on the subscriber, at his office, in the city of Devils Lake, in the county of Ramsey, State aforesaid, within thirty days after the service of said summons upon you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated at Devils Lake, North Dakota, this 16th day of June, A. D. 1896.

P. J. McCLORY,
Assistant Attorney General, State of North Dakota,
Attorney for Plaintiff, Devils Lake, North Dakota.

Complaint.

(Title.)

The complaint of the plaintiff shows to this court:

I.

That P. J. McClory is now and since the 3rd day of December, A. D. 1895, has been duly appointed, qualified, and acting assistant attorney general of the State of North Dakota, and that he is
37 the said relator in the above-entitled action and a resident and citizen of the State aforesaid.

II.

That from and since the 5th day of June, A. D. 1896, the said defendants, Michael E. Murphy and Norman Markuson, in a building upon the following-described premises, situated in the county of Barnes, State of North Dakota, to wit, lot 4, in block 25, of the original town site of the city of Valley City, Barnes county, N. D., have maintained, have permitted to be maintained, do now maintain and permit to be maintained a common nuisance, to wit, a place where intoxicating liquors, to be used as a beverage, are kept for sale, gift, barter, trade, and delivery, where said liquors are sold, given away, bartered, traded, and delivered to be drank as a beverage, and where

persons are permitted to resort and do resort for the purpose of drinking intoxicating liquors as a beverage.

III.

That since the 5th day of June, A. D. 1896, the said Norman Markuson has sold intoxicating liquors at said place to divers and sundry persons and particularly as follows: On said 5th day of June, 1896, one Frank L. Kellogg purchased whiskey and beer from said Norman Markuson upon said premises to be drank as a beverage; is now selling such liquors continuously and as a common practice and business; has permitted and still permits intoxicating liquors to be used and drank as a beverage in and upon said premises, and knowingly permits persons to resort to said place for the purpose of drinking intoxicating liquors as a beverage.

IV.

38 Plaintiff alleges on information and belief that the defendant Michael E. Murphy was on the 5th day of June, A. D. 1896, ever since has been, and now is the owner in fee of the said premises hereinbefore described where said common nuisance is kept and maintained as aforesaid and leases and rents the same to the said Norman Markuson.

That no druggists' permit to sell or barter intoxicating liquors in this place where said common nuisance is kept and maintained has been issued to said defendant by the judge of the county court of said Barnes county.

VI.

Plaintiff alleges on information and belief that the said defendants will continue to keep and maintain said common nuisance and permit the same to be kept and maintained after the commencement of this action, unless restrained by the injunctional order and decree of this court.

Wherefore plaintiff prays judgment:

First. That the premises hereinbefore described be adjudged and decreed a common nuisance, and that the same be abated in due form of law.

Second. That the said defendants, agents and servants, and each of them be perpetually enjoined from using or permitting to be used the said premises, or any part thereof, as a place where intoxicating liquors are sold, bartered, or given away, or kept for sale, barter, or giving away otherwise than allowed by law, and from keeping and maintaining said premises, or any part thereof, as a place where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage.

39 Third. That a temporary injunctional order be issued forthwith enjoining the defendants, their agents or servants, until further order of the court, from keeping open or permitting to be open the said above-described premises as a common nuisance, and from selling, bartering, giving away, or keeping for sale, barter, giving away, or use at, in, or about said premises any intoxicating liquors,

and from permitting such liquors to be sold, bartered, or given away or kept for sale, barter, giving away, or use at, in, or upon said premises.

Dated at Devils Lake, in the county of Ramsey, North Dakota, this 16th day of June, A. D. 1896.

P. J. McCLORY,
Assistant Attorney General, State of North Dakota,
Attorney for Plaintiff, Devils Lake, North Dakota.

STATE OF NORTH DAKOTA, } ss:
County of Ramsey, }

P. J. McClory, being duly sworn, on oath says that he is the duly appointed, qualified, and acting assistant attorney general in and for the State of North Dakota and attorney for the plaintiff that he has read the foregoing complaint, knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

P. J. McCLORY.

Subscribed and sworn to before me this 16th day of June, A. D. 1896.

A. S. WEMPLE,
Notary Public, North Dakota.

40 *Affidavit.*

STATE OF NORTH DAKOTA, } ss:
County of Stutsman. }

(Title.)

Frank L. Kellogg, being first duly sworn, on oath deposes and says that intoxicating liquors, to wit, whiskey and beer, are kept for sale, sold, bartered, and given away as a beverage on the following-described premises, to wit:

Lot four, in block twenty-five, of the original town site in the city of Valley City, Barnes county, N. D.

And that (to the best of knowledge, information, and belief of affiant) Norman Markuson — conducting said business and making such unlawful sales, and the basis of affiant's knowledge and belief is as follows:

That on the 5th day of June, 1896, deponent purchased upon said premises intoxicating liquors as a beverage, and the same was so drunk as a beverage.

And a search warrant is prayed for to the end that the said premises may be searched, as provided by law, at the time of service of an injunctional order in the above-entitled action.

FRANK L. KELLOGG.

Subscribed and sworn to before me this 10th day of June, A. D. 1896.

B. F. BIGELOW,
[SEAL.] *Notary Public, North Dakota.*

41 *Search Warrant.*

(Title.)

The State of North Dakota to the sheriff or any constable or marshal of Barnes county:

In the above-entitled action, a summons and complaint having been duly issued, and an injunctional order restraining the above defendants, Michael E. Murphy and Norman Markuson, from selling or keeping for sale, barter, or delivery any intoxicating liquors of any kind on the following-described premises, to wit, lot 4, in block 25, of the original town site of the city of Valley City, Barnes county, N. D., having been granted by the court herewith, and an affidavit having been presented to this court, together with the papers aforesaid, setting forth that intoxicating liquors, to wit, whiskey and beer, are kept for sale and are sold, bartered, and given away in violation of the law on the above-described premises:

Now, therefore, you are hereby commanded, at the time of serving the aforesaid injunctional order, bearing even date herewith, to diligently search the premises above described and carefully invoice all articles found therein, used in or about the carrying on of the business aforesaid, and if upon such search you shall find upon said premises any intoxicating liquors of any kind you shall take the same into custody and securely hold the same to abide the final order and judgment of this action, and also take and hold possession of all personal property found on such premises and take and hold possession of such premises and keep the same closed

42 until such final judgment. Hereof fail not.

Dated this 22nd day of June, A. D. 1896.

RODERICK ROSE, *Judge.*

Endorsed: State of North Dakota, 5th judicial district, county of Barnes, ss: Filed in the office of the clerk of the court for the county of Barnes, North Dakota, this 27th day of July, 1896. H. O. Sterl, clerk of said court.

Injunctional Order.

(Title.)

It appearing to the satisfaction of the court by the verified complaint and the affidavit of Frank L. Kellogg, hereto attached, and the statute in such cases made and provided that the defendants should be restrained from the commission of the acts hereinafter enjoined, and that the commission or continuance of the acts set forth in the complaint during the pendency of this action would produce public injury, and it appearing by said complaint and the affidavits that the defendants during the pendency of this action are doing or procuring and suffering to be done and threatened or are about to do, procure and suffer to be done the acts hereinafter enjoined:

Now, therefore, on motion of P. J. McClory, assistant attorney general in and for the State of North Dakota, attorney for plaintiff—

It is ordered that the defendants, Michael E. Murphy,
43 Norman Markuson, agents, attorneys, and servants, and each of them, are hereby enjoined and restrained until further order of this court from using or permitting to be used the following-described premises, to wit, lot 4, in block 25, of the original town site of the city of Valley City, Barnes county, N. D., as a place for the sale of intoxicating liquors or as a place for keeping for sale intoxicating liquors of any kind, character, or description, otherwise than by the authority of a druggist's permit, as provided by law, and from permitting intoxicating liquors to be drank in, upon, or about said premises, and the defendants and each of them are enjoined and restrained until the further order of the court from keeping or permitting to be upon the said above-described premises, and from selling, bartering, or giving away, and from keeping for sale, barter, or use about said premises, and from permitting to be drank upon said premises any vinous, malt, spirituous, fermented, or other intoxicating liquors, and from permitting said liquors to be sold, bartered, or given away, or to be kept for sale, barter, delivery, or use at, in, or about said premises; and if the sheriff, constable, or marshal, or any other officer serving or executing the summons, complaint, affidavit for search warrant, search warrant, injunctional order, or any other order of this court issued in said action shall take possession of said premises or any part thereof, or of any personal property found in or upon said premises, the defendants, their attorneys, agents, and servants, and each of them are hereby restrained and enjoined from interfering in any way whatever with said premises or personal property or any part thereof after such possession
44 is taken, and from entering into said premises so taken possession of or disturbing in any manner the possession of said sheriff, constable, or marshal, or other officer, until the further order of this court.

Dated at Jamestown, N. D., this 22nd day of June, A. D. 1896.

By the court:

RIDERICK ROSE, *Judge.*

Endorsed: State of North Dakota, 5th judicial district, county of Barnes, *ss:* Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 27th day of July, 1896. H. O. Sterl, clerk of said court.

Return of Officer.

(Title.)

I, Hans O. Hagen, a duly elected, qualified, and acting constable of the said county and State, do hereby certify and return—

That the summons, complaint, affidavit for search warrant, search warrant, and injunctional order in the above-entitled action and hereunto attached came into my hands for service on the 26th day of June, 1896.

On said day I served all the aforesaid papers personally on both of the above-named defendants by delivering to and leaving with each of them a true copy of each of the above-mentioned papers, the originals of which are hereto attached. Thereupon, and after the service of said injunctional order and all other papers as above described, I entered the premises described in said search
45 warrant and made a search in accordance with the mandate of the court therein. I found on said premises a large quantity of intoxicating liquors, to wit, lager beer and whiskey, and thereupon took possession of the same and locked up the premises.

HANS O. HAGEN.

Subscribed and sworn to before me this 25th day of July, 1896.

H. P. SKRANSTAD,
Justice of the Peace.

Fees	$55.77
Ad. def't	3.77
	$59.54

Said defendant, Norman Markuson, having been placed under arrest pursuant to said attachment writ and having been brought into court on the 3rd day of August, 1897, the following proceedings were had before Honorable S. L. Glaspell, judge of the 5th judicial district in and for Barnes county, State of North Dakota, to wit:

Thereupon defendant, being arraigned and before plea, interposed the following motions; which were overruled by the court; to which ruling the defendant excepted; which exception was duly allowed.

Motion.

(Title.)

The defendant, by his attorneys, Marion Conklin and M. E. Remmen, moves that the information and attachment herein be dismissed and quashed upon the following grounds, viz:

46 First. That the search warrant set forth in said information directing the seizure of certain property, and the injunction therein set forth enjoining any person from interfering with the officer's possession of the same after it had been seized, are void for the following reasons, to wit:

That said search warrant is contrary to the provisions of section 18 of the constitution of the State of North Dakota in this, that it is unreasonable, vague, and indefinite, and does not particularly describe the place to be searched or the things to be seized.

Second. That it does not appear from the affidavit or information herein that the officer executing said search warrant executed and returned the same within ten days, as provided by section 3471 of the Code of North Dakota, and that the same had not become void by reason of the failure of said officer to execute and return the same within the time provided by said section 3471.

Third. That the provisions of section 7605 of the Code of North Dakota, authorizing the issuance of said search warrant and directing the officer that in case he finds intoxicating liquors on the premises directed to be searched he is to seize and take into his hands all personal property found on said premises, is in conflict with section 13 of the constitution of the State of North Dakota, which provides that no person shall be deprived of life, liberty, or property without due process of law, and that the search warrant set forth in the information herein issued in pursuance thereof is void.

Fourth. That there is another remedy provided by statute for the offense charged in the information herein.

MARION CONKLIN,
MAR-IN E. REMMEN,
Attorneys for Defendant.

47 *Motion.*

(Title.)

Then the defendant demands the right to plead and be tried by the laws regulating criminal contempt, as defined by chapter 34, article 1, of the Code of Civil Procedure, for the reasons that the allegations and averments in the information do not constitute contempt, as defined by section 7605.

The contempt described in section 7605 only relates to the contempt for disobedience of the injunctional order as permitting the enjoined premises to be used for the purposes constituting the nuisance complained of, which is the only injunction specifically authorized by that section; neither was any further injunction prayed for in the complaint.

That that portion of the injunctional order mentioned and set forth in the information herein with which the defendant is charged of violating is in excess of the prayer of the complaint, and therefore erroneous.

MARION CONKLIN,
MARTIN E. REMMEN,
Attorneys for Defendant.

After the overruling of said motions defendant Norman Markuson enters a plea of not guilty.

Thereupon the defendant, in open court, demands a trial by jury; which request and demand was denied by the court; to which ruling defendant duly excepted; exception allowed by the court.

Whereupon, the defendant being placed upon trial before the court without a jury, the following evidence was introduced:

48 HANS O. HAGEN testified that he was a duly elected and qualified constable; that he served original in-unctional order, summons, and complaint, together with search warrant, on the 26th day of June, 1896.

Q. What did you find in the building at the time you served the papers?

A. Why, a few bottles of beer in the cooler behind the bar and some cases marked Schli-z beer. I did not examine the cases to see whether it was Schlitz beer or not, but that was the label that was on them.

Q. Did you find any whiskey?

A. There was a bottle in there that looked like whiskey, I did not taste it.

When I went in with the papers Markuson was standing at the bar, and I took possession of the premises, drove him out, and locked up the building. I told three men to watch it. Alex. Cummings and Mr. Carlton were outside of the building. I then went away and came back and found the doors broken open. I looked to see if the beer bottles were all out. I tried to take an invoice, and the crowd came in there and commenced to throw billiard balls at me. One of the crowd threw them from the outside of the building. The crowd came in at the back door and we went into the front room and we had to go through the front room to go out on the street and there was quite a mob came in. I cannot tell who threw the bill-ard ball. I made no attempt to go into the building after they threw the bill-ard balls at me. I was in the building twice that day—first, when I served the papers; second, when I came back to invoice and it was broken open. Mr. Carlton and I made an inven-
49 tory of what we found. The inventory contained some cases of beer and two or three bottles that were in the cooler. I do not remember exactly what it contained, and the counter and some furniture. I think the inventory contained ten cases; whether they were all full with beer I do not know. It was marked Schlitz beer. I found a bottle that looked like whiskey, although I would not swear to that. I found some beer cases, beer bottles, chairs, and a counter, a regular saloon counter. This was downstairs, on the first floor, in the back part of the building.

Cross-examination:

I don't think that I read the papers to Markuson. I handed him a copy of the papers and told him that it was a search warrant and injunctional order, and that I wanted possession of the building. It was in his place of business. The search warrant ordered me to search lot 4, block 25. It does not mention any building; it is supposed to be the building thereon. Mr. Root told me this was block 25. I searched no other place on that lot. All I know about that being beer was by the label. I did not make this invoice from actual count. I cannot say that there were ten cases. Yes; I said the ca-es were full. I took hold of one. It had the appearance of being full. I did not see Markuson in the crowd that broke in. Markuson did not remonstrate when I notified him to be present and invoice. He went out peaceably. He made no threats or anything of the kind, and I put the locks on the doors without any assistance. I requested Murphy, the owner of the building, to open the door when I first

went there, and he informed me that it was rented and that
50 he had nothing to do with it. I heard some one on the inside and asked them to open the door, and I told them I had a search warrant and if they failed I would break in, and nobody answered and I broke open the door.

Q. You don't know whether they heard your request or not?

A. They must have heard it. There is no question about it.

DELEVAN CARLTON called and sworn on behalf of the State:

I was in Valley City on the 26th day of June, 1896, and was called upon to assist in serving some papers by officers in particular cases. The Markuson case is one of them. I am not acquainted with Norman Markuson. This is the man that is called by that name. I was informed that he was engaged in 1896 in selling liquor unlawfully. I did not know his place of business until shown me. I was on Main street not far from the place kept by Patrick McNulty, on the east side of Main street. It was a frame two-story building with a store front. When I first got there I saw a crowd around the back of the building. After awhile I was asked to go into the building with Mr. Hagen and assist in the inventory. I came to the rear of the building and saw a dray-load of stuff taken away and another made up after that, after which we started to make an inventory and took an inventory of the stuff. The building was known as the Murphy building. I heard it so called. We went into the room opening off the street and took an inventory, and a crowd came into the front room and interfered with our work.

There were some appliances, I should think, that belonged
51 to a saloon, glasses and a counter on the east side of the building and some glasses, chairs, and a cooler back of the counter. We found some empty bottles supposed to be beer bottles. I do not remember seeing any beer bottles filled. I saw them hauling out of the building cases, I think, labelled Schlitz beer. I stood right alongside of them. I could not say how many. It was a full dray-load. A two-horse wagon hauled away two loads. The most of it was taken from the Murphy place. I have no recollection of seeing Markuson until I saw him in this court at this time. I saw no acts of violence. I heard some threats while we were in the room taking the inventory. Some solid projectiles were hurled at us, striking against the end of the building. I was told it was a billiard ball. After that Mr. Hagen stopped his inventory and I followed him out. I do not remember anything that was said. I did not see the defendant on the premises.

HERBERT ROOT called and sworn on the part of the State:

I am acquainted with Norman Markuson and have known him a little over two years. This is the man. He was engaged in running a blind pig on Main street, in the city of Valley City, county of Barnes. I placed in the hands of Hanss O. Hagen some papers against Norman Markuson to be served. Mr. Hagen went to the building, which is situated on lot 4, block 25, in Valley City. I afterwards went down there and saw a crowd at the rear of the building

removing cases of beer and placing them on the dray. The
52 defendant Markuson was there taking out the liquor and putting it on the dray. The defendant Markuson placed a case on the dray labelled Schlitz Brewing Company beer and assigned different ones to help him. I was standing in the street in front of the building, probably 50 feet back. I do not know whether this was after the papers were served. All that I know about the contents — these cases is from the label on the boxes. I am positive that this occurred at the Norman Markuson place, the Murphy building.

Cross-examination:

Q. How do you know that he was running a blind pig?
A. Because he had appliances so that you could not see what was going on. I saw him going in and coming out frequently.

EARNEST WALTEMATE called and sworn on behalf of the State:
I am city marshal of the village of Sanborn. I was in Valley City on the 26th day of June, 1896, at the place known as the Murphy and Markuson building. I cannot say that I saw the defendant Markuson there. There was a large crowd there handling these cases. I started in, and the crowd gathered around me and I could not do anything and I walked out of the door onto the street. I was not acquainted with the defendant Norman Markuson at that time and do not know if he was there. I don't know of my own knowledge whether this was the Murphy building or whether Norman Markuson had anything to do with the building or not.

G. GOMESTAD called and sworn on behalf of the State:
53 I am a drayman, residing at Valley City, and was engaged in draying — 1896. I am acquainted with Norman Markuson, the man sitting there; have known him nine or ten years. I remember the raid made on the blind pigs on the 26th day of June, 1896. I was called upon to take out of the Murphy building, the one occupied by Markuson, several cases of beer and other articles. It was in the afternoon. I do not remember the hour. I could not state who called me. I cannot swear whether it was Markuson or not. The person who called me asked me to drive back of the building known as the Murphy building. I could not say what kind of a looking man it was. They wanted me to turn my team around and back it afterwards. I could not state who asked me to do it. I sat on the seat of the dray and was looking towards the building and the cases were put upon my dray. I could not say who put them on, there were so many people there. I might have known at the time, but I do not now. No one has talked to me about this case since the matter occurred. I have hauled some cases for Markuson. I will not swear that I did not see Markuson that day. It might have been Markuson that told me to drive over there. I could not say that Markuson put any of the beer on the dray; might have been half a dozen different ones. I cannot say how many cases I had. There were quite a few. I hauled the cases down to a building southwest.

I think it was occupied by Markuson, but I do not know whether it was or not. It was a dwelling-house. They took the stuff off the dray and piled it on the ground. I cannot say who did it. I cannot say who told me to drive there. I don't think Markuson rode down with me on the top of the dray. I don't think any one
54 was on the dray with me. I did not place the cases in the cellar at the Markuson place. They were left outside of the house, in the yard. I do not know how many cases were unloaded. There was a large crowd of people there. I cannot state how many. I took no whiskey barrels, beer kegs, cider or gin barrels away from there. It was not dark. I cannot point out any person who told me to take them off the dray. I did not take any particular notice who was there. It was a long time ago. I do not know who asked me to drive there. I do not think it was Norman Markuson who asked me to haul these goods away. I do not remember seeing Markuson there at the building. There was no evidence.

Cross-examination:

This occurred between three and five o'clock in the afternoon. I did not see Markuson there. I would not swear that it was Norman Markuson that employed me to haul this stuff away. The cases I hauled looked like beer cases. I do not know what was in them. I did not handle the cases. Markuson might have been around there in the crowd. I did not see him. I cannot say that he was.

O. N. RUSHFELT called and sworn on behalf of the State:

I reside in Valley City; have known Herbert Root about seventeen years; have lived here about seventeen years; have known Markuson ever since he came here; was in Valley City on the 26th day of June, 1896. I remember what occurred at the Murphy building on that date. I saw Mr. Root there on the sidewalk
55 near the building. They had a dray standing at the back of the building. There was quite a crowd around and considerable excitement. I presume I saw Markuson afterwards. I did not see him at the time. I saw Murphy there. I saw him coming from the back of the building. I cannot say that I saw Markuson on the premises at the time the dray was there.

SEVER RITEN called and sworn on behalf of the State:

I live southwest from Valley City about ten miles. I know Markuson by sight. I was in town on the 26th day of June. I saw Mr. Root there at the time. I saw Markuson there on the sidewalk. He was standing on the sidewalk. I also saw the dray standing there, and a team attached to the wagon. I do not think I saw Markuson there at all. I saw him go into the back part of the building. The dray was standing ten feet from the back door. I did not see him load anything on the dray. I was there ten or twenty minutes and the dray went away while I was there. I remained till it came back a second time. I saw them put on one load. I only saw one load leave there. I saw Markuson go into the back door, but I did not see him put anything onto the wagon. There was one man on

the top of the dray when it drove away. I was there before any boxes were put on the wagon. They were put on by a stranger to me. Markuson did not, to my knowledge, carry any of the goods out of the building. I do not know whether Markuson was there when the dray left. He was there at the time the dray was loaded.

55½ State rests.

NORMAN MARKUSON called and sworn in his own behalf:

I am the defendant in this action and remember when Hans O. Hagen came to my place on the 26th day of June, 1896. I went out with Hagen and the front and back doors were locked; the side door was unlocked. When we went out I stayed on the sidewalk while waiting for Hagen to return. He said he would be back in five minutes and take an inventory of the stuff. He came back in about two minutes, and I asked him if he was ready, and he said he would have to go and get other papers, and I went away uptown to find out about the matter and how he could come and take possession of my place and bust in the door without papers. When I came back the doors was open and a wagon driving away and four or five fellows in the building. I did not direct or in any way interfere with the taking of the stuff. I saw the stuff down in my yard. I asked Murphy why he took it down there. There was no one at my home when the stuff was taken there. Mr. Hagen never has asked me for this property since. When I went into the building I chased the boys out, locked the door and turned the keyes over to Murphy, and never went into the building after that. I had another place of business up the street, and had stopped doing business in the Murphy building two or three days prior to this.

The door was locked when Hagen came. He broke open the door.

56 Cross-examination.

By Mr. WINTERER:

I turned the keyes over to Mr. Murphy that evening after I locked the place up, on the 26th day of June, 1896. The keyes were turned over to Murphy after the stuff was taken out. Murphy lived upstairs and had keyes to the building. I rented the downstairs and had keyes for the three doors. I rented just a part of the building. It was after the time when Hagen first came into the back door. I was in the back room settling up my business with Murphy. Ed. Larue and Thos. O'Malley were there playing cards. Mr. Hagen smashed the door in. I asked him what reason he had for breaking in the door, and he said he had some papers. I asked him for his authority, and he said he did not have to show it. He took a bunch of papers and threw them on the pool table. I did not look at them at that time. I did when I came back and locked up the building. After Hagen threw down the papers he told Murphy to go and get a padlock, and he went and got the lock. Hagen remained there a few minutes and then locked the door with a padlock on the outside. O'Malley, Larue, Murphy, and myself went

out. I staid there for a little while waiting for Hans to come back, as he told me that he wanted me to help him to make an inventory. When he returned, in about two minutes, I asked him if he was ready to go in, and he said he would have to get other papers to make it. I did not see him take an inventory. I then went uptown to see about the matter and to see what right he had to take possession of the place when he had to have other papers. When I returned, in about 15 minutes, I first learned that the stuff was taken out. The door was open and I did not
57 see the padlock. It was on when I went away. The next I saw of the stuff it was on the ground in my yard. I went back uptown and told Murphy to take it away. He said he would after a little. It was gone when I went back downtown in the evening. I don't know what dray hauled the stuff away. I don't know what they did with the other boxes. The team was leaving the building with the stuff when I came back. I did not see where they were going. I went home after locking up the building. It was in about ten minutes that I reached home and found the stuff there. I then went downtown to hunt up Murphy. I told him that he had no business to haul the stuff down to my premises. Murphy told me that he sent it there. I found the cases there. I did not open the cases. I did not see the kegs. Hagen said he had some papers and threw them down on the pool-table. He did not read the papers at all. After the stuff was taken I took the papers up.

State now offers in evidence the summons, complaint, in The State of North Dakota *ex rel.* Martin H. Wilberg, plaintiff, against Norman Markuson, defendant, dated December 12th, 1894, together with the affidavit for search warrant, search warrant, injunctional order, dated on the same date, the information in the contempt proceedings against this defendant, the order for attachment, the record of the court showing the trial of the defendant for violating said injunctional order, and the judgment of the court finding him guilty of violating said injunctional order in this, to wit, that between the 29th day of December, 1894, and June 10th, 1895, this named defendant kept a place for persons to resort for the purpose
58 of drinking intoxicating liquors as a beverage, situated upon lot 4, block 25, of the original town site of the city of Valley City, Barnes county, North Dakota, as will more fully appear by the affidavits of Herman Winterer, State's attorney of said county, and Ole Abrahamson; that thereupon the defendant was found guilty, sentenced to be imprisoned in the county jail of Barnes county for a period of ninety days and to pay a fine of $200.00, defendant having thereafter appealed said case to the supreme court of this State and the judgment of the lower court was affirmed and the defendant punished thereunder.

Thereupon the case is closed. The court now makes and files his findings of fact, conclusions of law, and order for judgment as follows:

Findings of Fact and Conclusions of Law and Order for Judgment.

First. That on the 22nd day of June, 1896, a search warrant was duly issued by the Honorable Roderick Rose, judge of this court, in said case of The State of North Dakota *ex rel.* P. J. McClory, assistant attorney general, plaintiff, *vs.* Norman Markuson and Michael E. Murphy, defendants, directed to the sheriff or any constable or marshal of the county of Barnes, State of North Dakota, commanding such officer to search the following-described premises, lot No. —, in block No. twenty-five, in the original town site of Valley City, Barnes county, North Dakota, and to seize and hold any intoxicating liquor found thereon.

59 Second. That on the said 22nd day of June, 1896, the said Honorable Roderick Rose issued a temporary injunctional order in the above cause, among other things, enjoining and restraining the said defendants, Norman Markuson and Michael E. Murphy, their agents, attorneys, and servants, in case the officer serving the said search warrant and said injunctional order should seize and take possession of said premises or any personal property found thereon, from in any way interfering with said premises or any said personal property or any part thereof after such possession should be taken by such officers or from in any way disturbing the possession of such officer.

Third. The said search warrant and injunctional order were duly and personally served upon the said defendant, Norman Markuson, in Valley City, Barnes county, North Dakota, on the 26th day of June, 1896, by one Hans O. Hagen, a duly qualified and acting constable of the said Barnes county.

Fourth. That the said officer, Hans O. Hagen, after serving the said search warrant and the injunctional order took possession of the said premises and certain personal property found thereon, to wit, a large quantity of intoxicating liquors, to wit, beer.

Fifth. That after the service of the said search warrant and the said injunctional order upon the said defendant, Norman Markuson, and after the possession of said premises and said personal property was taken by said officer, and while the injunctional order was in full force and effect, the said defendant, Norman Markuson, with force and violence, rescued and retook possession of the said premises and said personal property, and removed and carried

60 away the said personal property, to wit, a large quantity of beer, from the said premises and from possession of said officer.

Sixth. That the said defendant, Norman Markuson, was tried, found guilty, and convicted on the 29th day of June, 1895, for violating the lawful provisions of a certain injunctional order, issued by the judge of this court, under and pursuant to section 13 of chapter 110 of the Laws of 1890 of the State of North Dakota, being section 7605 of the Revised Code of the said State.

Conclusions of Law.

From said findings of fact the court makes the following as its conclusions of law:

That the said defendant, Norman Markuson, is guilty of criminal contempt of court, as provided by section 7605 of the Revised Code of the State of North Dakota, and that the said contempt is and constitutes the second offense of contempt under and against provisions of said section 7605 of the Revised Code of the State of North Dakota.

Order for Judgment.

Pursuant to the facts found in the trial of the above-entitled cause by this court and its conclusions of law adduced therefrom, and on motion of Edward Winterer, State's attorney for Barnes county, North Dakota, and Herbert Root, assistant and special counsel, appearing for the State of North Dakota—

It is hereby ordered that the judgment and sentence of the court be rendered and pronounced in open court in the presence and
61 hearing of said defendant, Norman Markuson, and that the clerk enter the same upon the minutes of the court. The judgment and sentence against the said defendant, Norman Markuson, is that he be imprisoned in the State penitentiary for the State of North Dakota for the period of one year.

Let judgment be entered accordingly.

By the court:

S. L. GLASPELL, *Judge.*

On the 6th day of August, 1897, the defendant perfected an appeal to the supreme court of the State of North Dakota by serving upon the plaintiff's attorneys and the clerk of the district court, Barnes county, a notice of appeal and a supersedeas bond in the sum of one thousand dollars ($1,000.00).

Defendant's Assignments of Errors.

(Title.)

Now comes the defendant and says there is manifest error on record herein, to his great prejudice, and assigns and specifies the same and assigns said specifications of error as a reason why the verdict should be set aside, vacated, and that he be restored to all his rights and privileges:

I.

That the court erred in refusing to quash and vacate the information and attachment filed in such case upon the grounds as follows:

1. That said information is insufficient on its face.

62 2. That the search warrant set forth in said information directing the seizure of certain property and that the injunc-

tion therein set forth enjoining any person from interfering with the officer's possession of the same after it had been seized *was* void for the following reasons: That said search warrant is contrary to the provisions of section 18 of the constitution of the State of North Dakota in this, that it is unreasonable, vague, and indefinite, and does not particularly describe the place to be searched or the things to be seized.

3. That it does not affirmatively appear from the affidavit of information herein that the officer executing such warrant executed and returned the same within the ten days, as provided by section 8471 of the Revised Code of the State of North Dakota; that the same has not become void by reason of the failure of said officer to execute and return the same within the time provided by section 8471 of the Revised Codes of the State of North Dakota.

4. That the provisions of section 7605 of the Revised Codes of the State of North Dakota, authorizing the issuance of a search warrant directing the officer that in case he finds intoxicating liquors on the premises to be searched he is to seize and take into his possession all property found on said premises, is in conflict with section 13 of the constitution of the State of North Dakota, which provides that no person shall be deprived of life, liberty, or property without due process of law, and that the search warrant set forth in the information herein and issued in pursuance thereof is void.

63 5. That the court erred in refusing the defendant's demand to be tried under the law regulating the trial of criminal contempts as defined by chapter 34, article 1, of the Code of Civil Procedure, for the reason that the allegations and averments in the information did not constitute contempt as defined by section 7605 of the Revised Codes of the State of North Dakota.

6. That the court erred in overruling defendant's demand to be tried by jury.

II.

That the court erred in its conclusions of law as based upon its findings of fact in this:

1. That the fifth finding of fact does not bring the defendant within the provisions of section 7605 of the Revised Codes of the State of North Dakota in this, that the findings therein found constitute no contempt under section 7605 of the Revised Codes of the State of North Dakota.

2. That the court erred in its conclusions of law wherein he finds that the defendant is guilty of contempt as described in section 7605 of the Revised Codes of the State of North Dakota, and that said contempt "is and constitutes a second offense under and against the provisions of section 7605 of said Revised Codes of the State of North Dakota," in this, that the court makes no findings of fact which constitute contempt under section 7605 of the Revised Codes of the State of North Dakota.

3. The court erred in its findings of fact and conclusions of law wherein he finds the defendant guilty of a second offense of con-

tempt under section 7605 of the Revised Codes of the State of
64 North Dakota upon the ground and for the reason that the information does not state facts sufficient to constitute a second offense under section 7605 of the Revised Codes of the State of North Dakota, and does not give the court jurisdiction to try the defendant for a second offense under said section.

III.

That there is also manifest error on the face of the record in this, to wit:

1. That the evidence does not tend to or support the findings of fact and conclusions of law for the following reasons: There is no evidence showing or tending to show that the said defendant, Norman Markuson, with force and violence rescued and retook possession of the property or premises described in said complaint or search warrant, or that he carried away the same as held by the court in paragraph 5 of the findings of fact.

2. There is no evidence showing or tending to show that any part or portion of the property described in said search warrant in said complaint or as having been taken possession of under the return of said constable—that the same or any part thereof was intoxicating liquors or used in the maintenance of any nuisance, as described in section 7605 of the Revised Codes of the State of North Dakota.

3. That there is no evidence showing or tending to show that the said defendant committed a contempt of court as described by section 7605 of the Revised Codes of the State of North Dakota, as found by paragraph 5 of the findings of fact made by the court in this action.

64½ IV.

That there is manifest error on the face of the record herein in this, that the order for judgment and the judgment as pronounced by the court herein is void for indefiniteness and uncertainty in this, that it does not sufficiently specify and fix the time when said sentence shall commence and become operative and in full force and effect.

65 V.

The court erred in overruling defendant's request for trial by jury for the reason:

That by so doing the court denied the defendant a constitutional right as provided by section 7 of the constitution.

The court erred in pronouncing judgment upon the defendant for the reason:

That the defendant was deprived of his liberty without due process of law, which is guaranteed to him under section 13 of the constitution.

That the judgment of the court is void:

First. For the reason that it is not based upon or warranted by any law in force at the date thereof in the State of North Dakota.

Second. That section No. 7605 is unconstitutional and void in so far as it provides for imprisonement in the State's prison for contempt of court.

Dated this 15th day of September, A. D. 1897.

M. CONKLIN,
M. E. REMMEN,
W. H. BARNETT,
Attorneys for Defendant.

STATE OF NORTH DAKOTA, }
County of Barnes. }

In the District Court, Fifth Judicial District.

STATE OF NORTH DAKOTA, Plaintiff, }
against }
NORMAN MARKUSON, Defendant. }

66 I, S. L. Glaspell, judge of the district court in and for the county of Barnes, State of North Dakota, fifth judicial district, before whom the foregoing-entitled action was tried, hereby certify that the record herein attached contains in itself all the bill of exceptions and a true copy of all the evidence in said case, and I hereby certify that the exceptions appearing therein were made within due time and within that allowed by the court, and that the assignments of error therein contained have been examined and allowed by the court, and the said foregoing attached bill of exceptions is hereby to be and become, and the same is hereby, attached to the record of said case, to be allowed in the arguments of it before the supreme court of the State of North Dakota, and I hereby further certify that the same has been properly examined by the court in due and within the time allowed by the court.

Dated this 21st day of September, 1897.

S. L. GLASPELL,
Judge of the District Court in and for Barnes County, Fifth Judicial District, State of North Dakota.

Respectfully submitted.

M. CONKLIN,
M. E. REMMEN,
W. H. BARNETT,
Attorneys for Defendant.

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Upon the back of said abstract appear indorsements in words and figures following, to wit:

"# 18. U. S. district court. In the matter of the petition of Norman Markuson for a writ of *habeas corpus*. Copy of abstract in the case of 'State of North Dakota *vs.* Norman Markuson.' Filed Mar. 31, 1898. J. A. Montgomery, clerk, by E. R. Steele, deputy."

68 & 69 Thereupon, afterwards, to wit, on said 31st day of March, 1898, a judgment was entered in said matter, which appears of record on the journal of the court, at page # 1861; which said judgment is in words and figures following, to wit:

"In the Matter of the Petition of NORMAN MARKUSON for a Writ of *Habeas Corpus*.

Comes now the petitioner, Norman Markuson, in the custody of the United States marshal, with his attorney, C. D. O'Brien, Esq., and The County of Barnes, by E. Winterer, Esq., county attorney, and N. F. Boucher, the warden of the State penitentiary of North Dakota. This matter having been heretofore argued and submitted to the court and taken under advisement, now, after due consideration, it is—

Ordered and adjudged that the writ of *habeas corpus* herein be, and the same hereby is, discharged, and said petitioner, Norman Markuson, be remanded to the custody of said N. F. Boucher, as warden of the State penitentiary of North Dakota.

Now, said petitioner prays an appeal from this judgment, and files his petition for appeal, and an order allowing same is signed in open court."

Thereupon, afterwards, to wit, on said March 31st, 1898, notice of appeal was filed in said matter; which said notice of appeal is in words and figures following, to wit:

" United States District Court, District of North Dakota.

In the Matter of the Petition of NORMAN MARKUSON for His Discharge on a Writ of *Habeas Corpus*.

Notice of Appeal.

70 SIRS: Please take notice that Norman Markuson, the petitioner above named, appeals to the Supreme Court of the United States of America from the judgment and determination of the said district court made and entered March 31st, 1898, in the above-entitled proceeding denying his petition for discharge from imprisonment.

Dated March 31st, 1898.

C. D. & THOS. D. O'BRIEN,
Attorneys for Petitioner, St. Paul, Minn.

To the Honorable John F. Cowan, attorney general for the State of North Dakota, and Edward Winterer, State's attorney.

Due service of the above notice of appeal is admitted, at Fargo, North Dakota, this 31st day of March, 1898.

EDWARD WINTERER,
Valley City, N. D., State's Attorney.
JOHN F. COWAN,
Attorney General State of North Dak., Bismarck, N. D."

Upon the back of said notice of appeal appear indorsements in words and figures following, to wit:

"18. United States district court, district of North Dakota. In the matter of the petition of Norman Markuson for his discharge on a writ of *habeas corpus*. Notice of appeal. Filed Mar. 31, 1898. J. A. Montgomery, clerk, by E. R. Steele, deputy."

Thereupon, afterwards, to wit, on said 31st day of March, 1898, an assignment of errors was filed in said matter; which said assignment of errors is in words and figures following, to wit:

71 " United States District Court, District of North Dakota.

In the Matter of the Petition of NORMAN MARKUSON for His Discharge on a Writ of *Habeas Corpus*.

Assignment of Errors.

Now comes said Norman Markuson, the petitioner above named, by C. D. & Thomas D. O'Brien, his attorneys, and files in this court an assignment of errors in the final order and judgment of said court denying his application to be discharged as follows:

1. That said district court erred in holding and adjudging that his imprisonment was not contrary to law and in violation of the Constitution of the United States.

2. That said district court erred in holding and adjudging that said Norman Markuson was not entitled to his liberty.

3. That said district court erred in denying the application of the said Norman Markuson for his discharge.

4. That said district court erred in holding that chapter 110 of the laws passed at the first session of the Legislative Assembly of the State of North Dakota, being the laws of the year 1890 and the amendments thereto, is not unconstitutional and invalid under article 14 of the amendments to the Constitution of the United States of America.

5. The said district court erred in holding that section 13 of chapter 110 of the General Laws of the State of North Dakota for the Year 1890, being section 13 of chapter 110 of the Laws of the
72 First Session of the Legislative Assembly of the State of North Dakota, as amended is not void and unconstitutional under article 14 of the amendments to the Constitution of the United States of America.

6. The said district court erred in overruling the contention of said petitioner that those portions of the said section 13 of chapter 110 of the Laws of 1890, as amended, of the State of North Dakota which provide that an injunctional order may be issued by any district court of the State of North Dakota upon an affidavit or complaint, or both, of the State's attorney, attorney general, or his assistant upon information and belief, and those provisions of said section which provide that if an affidavit be presented to a court of judge stating or showing that intoxicating liquor is sold, bartered, or given away on certain premises the court or judge must, at the time of granting the injunction, issue his warrant commanding the officer serving the writ, at the time of such service, to diligently search the premises, and if such officer, upon such search, shall find upon such premises any liquors of any kind he shall take and hold possession of such premises and keep the same closed until such final judgment; also those portions of said section which provide that leasehold premises may be taken and closed in the manner aforesaid, regardless of any guilty intent or knowledge on the part of the lessor; also those portions of said section which provide that the owner of the premises, in case the same are leased, must pay all costs and prepare and file a bond, with sureties, conditioned that he will immediately abate any nuisance upon said premises and prevent the same from being established or kept thereon within the period of one year thereafter before he can secure a return of
73 such property, regardless of the guilt or innocence of said owner; also those portions of said section which provide for depriving a lessor of his property in the absence of any provision for making him a party to the action or giving him his day in court, are each and all unconstitutional and void as contravening the provisions of article XIV of the amendments to the Constitution of the United States.

7. The said district court erred in overruling the contention of said petitioner that said chapter 110 of the Laws of 1890, as amended, of the State of North Dakota, and particularly section 13 thereof, conferred no authority upon the district court of the State of North Dakota to issue and make its order closing the building and prem-

ises in question, with the disobedience of which order the petitioner was charged and upon which the said contempt proceedings were founded and based.

9. The said district court erred in overruling the contention of the petitioner that the said petitioner was, by reason of such order and judgment committing him for contempt by the said district court, deprived of his liberty without due process of law.

Wherefore the said Norman Markuson prays that said order and judgment of said district court made and dated March 31st, 1898, denying and refusing his application for a discharge, may be in all things reversed and he discharged from imprisonment.

Dated March 31st, 1898.

C. D. & T. D. O'BRIEN,
Attorneys for Petitioner, St. Paul, Minn.

Upon the back of said assignment of errors appear indorse-
74 ments in words and figures following, to wit:

"United States district court, district of North Dakota. In the matter of the petition of Norman Markuson for his discharge on a writ of *habeas corpus*. Assignment of errors. Filed Mar. 31, 1898. J. A. Montgomery, clerk, by E. R. Steele, deputy."

Thereupon, afterwards, to wit, on the said 31st day of March, 1898, a petition for appeal was filed in said matter; which petition is in words and figures following, to wit:

"United States District Court, District of North Dakota.

In the Matter of the Petition of NORMAN MARKUSON for His Discharge on a Writ of *Habeas Corpus*.

Petition for Appeal.

Application for his discharge having been denied, now comes Norman Markuson, the petition- above named, by C. D. & Thos. D. O'Brien, his attorneys, and in open court prays an appeal to the Supreme Court of the United States from the judgment and determination of this court denying his petition for his discharge.

Dated March 31, 1898.

C. D. & THOS. D. O'BRIEN,
Attorneys for Petitioner, St. Paul, Minn."

Upon the back of said petition appear indorsements in words and figures following, to wit:

"# 18. United States district court, district of North Dakota. In the matter of the petition of Norman Markuson for his discharge on a writ of *habeas corpus*. Petition for appeal. Filed Mar. 31, 1898. J. A. Montgomery, clerk, by E. R. Steele, deputy."

75 Thereupon, afterwards, to wit, on said 31st day of March, 1898, an order allowing appeal was made in said matter; which order is in words and figures following, to wit;

"United States District Court, District of North Dakota.

In the Matter of the Petition of NORMAN MARKUSON for His Discharge on a Writ of *Habeas Corpus*.

Appeal.

The application of Norman Markuson for his discharge having been refused by this court, and he having thereupon prayed this day in open court that an appeal be allowed to the Supreme Court of the United States from the said judgment and determination of this court, on motion of C. D. & Thos. D. O'Brien, attorneys for the petitioner, and after hearing Edward Winterer, State's attorney, it is—

Ordered that such an appeal be, and the same is hereby, allowed; and it is—

Ordered that the clerk of the United States district court for the district of North Dakota do send up to the Supreme Court of the United States a transcript of the petition, writ of *habeas corpus*, return thereon, and all other records, files, minutes, and proceedings in this matter.

It is further ordered that the said Norman Markuson furnish or cause to be furnished and filed an undertaking in his behalf in the sum of two hundred dollars ($200.00), to be approved by the undersigned, conditioned that the said petitioner shall pay all costs that may be awarded against him on account of said appeal
76 should the judgment be affirmed; and it is further ordered that the orders and judgments heretofore had in this cause remanding said Markuson to the custody of N. F. Boucher, warden of the State penitentiary of North Dakota, and all orders and judgments and commitments heretofore made and entered in and issued from the State court referred to in the petition herein be, and the same are hereby, superseded until a final decision of the Supreme Court can be had in the case upon the filing of a recognizance in the sum of four thousand dollars by or on behalf of said Markuson, with surety to be approved by t-e undersigned, conditioned for his appearance to answer said judgment.

Dated March 31st, 1898.

CHARLES F. AMIDON,
United States District Judge."

Upon the back of said appeal order appear indorsements in words and figures following, to wit:

"# 18. United States district court, district of North Dakota. In the matter of the petition of Norman Markuson for his discharge on a writ of *habeas corpus*. Appeal. Filed Mar. 31, 1898. J. A. Montgomery, clerk, by E. R. Steele, deputy."

Thereupon, afterwards, to wit, on said 31st day of March, 1898, a bond for costs was filed in this matter; which bond for costs is in words and figures following, to wit:

"United States District Court, District of North Dakota.

In the Matter of the Petition of NORMAN MARKUSON for his Discharge on a Writ of *Habeas Corpus*.

Bond for Costs.

77 Whereas the petitioner in the above-entitled cause and proceedings has duly applied for an appeal to the Supreme Court of the United States of America from the judgment of said district court, entered in said cause on the 31st day of March, 1898, denying his petition for discharge from imprisonment and discharging the said application; and

Whereas said petitioner's prayer for an appeal has been allowed and said appeal is by said petitioner about to be perfected:

Now, therefore, we, Thomas O'Malley and Otto Becker, of Valley City, North Dakota, residents and freeholders of said district of North Dakota, do hereby undertake, promise, and agree that if the respondent herein, The State of North Dakota, recover judgment in said action or the judgment so appealed from is affirmed that the said petitioner shall pay all costs that may be awarded against him on account of said appeal, not exceeding in the aggregate the sum of two hundred dollars ($200), which is the penalty of this undertaking.

In testimony whereof we have hereunto set our hands and seals this 31st day of March, 1898.

THOMAS O'MALLEY. [SEAL.]
OTTO BECKER. [SEAL.]

Signed, sealed, and delivered in presence of—
CHARLES J. MURPHY.
CHAS. S. HITCHCOCK.

78 STATE OF NORTH DAKOTA, } ss:
County of Cass, }

Be it known that on this 31st day of March, 1898, before me personally appeared Thos. O'Malley and Otto Becker, to me well known to be the same persons described in and who executed the foregoing instrument, and duly acknowledged that they executed the same.

[SEAL.]

J. A. MONTGOMERY,
Clerk U. S. District Court.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

Thomas O'Malley and Otto Becker came before me personally, and, being first duly sworn, each for himself doth depose and say that he is a resident and freeholder of the State of North Dakota and worth the sum of four hundred dollars ($400.00) over and above his debts and liabilities and property exempt from execution.

THOMAS O'MALLEY.
OTTO BECKER.

Subscribed and sworn to before me this 31st day of March, A. D. 1898.

[SEAL.] J. A. MONTGOMERY,
Clerk U. S. District Court."

79 Upon the back of said bond for costs appear indorsements in words and figures following, to wit:

"#18. United States district court, district of North Dakota. In the matter of the petition of Norman Markuson for his discharge on a writ of *habeas corpus*. Bond for costs. Filed Mar. 31, 1898. J. A. Montgomery, clerk, by E. R. Steele, deputy."

Thereupon, afterwards, to wit, on said 31st day of March, 1898, a supersedeas bond and order were filed in said cause; which bond and order are in words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
District of North Dakota, }

Be it remembered that on this 31st day of March, 1898, before me, J. A. Montgomery, clerk of the district court of the United States within and for the district aforesaid, duly appointed as such by said court, personally came Norman Markuson, as principal, and Thomas O'Malley and Otto Becker, as sureties, and jointly and severally acknowledged themselves to owe the United States of America the sum of two thousand dollars ($2,000.00), to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such that whereas the above-named Norman Markuson has duly applied to the said district court and the judge thereof for a writ of *habeas corpus* praying and asking a release from imprisonment from the State penitentiary of the State of North Dakota; and whereas, at a general term of the district court of the United States of the district of North Dakota, the judgment of said court was made and entered on the 31st

80 day of March, 1898, denying the petition of the said Markuson for his release and discharge and remanding him to the custody of the said warden of the said State penitentiary; and whereas afterwards, in open court, at a general term of the said district court, the said petitioner prayed an appeal from the judgment of the said district court of the United States to the Supreme Court of the United States, which said appeal has been allowed; and whereas the said district court of the United States has made and entered its order superseding the said judgment of the said district court of the United States and the order, judgment, and commitment of the district court of the district of North Dakota, under which said Markuson remained in prison, pending said appeal and until the final decision of the Supreme Court of the United States can be had in the case:

Now, therefore, we, the said Norman Markuson and Thomas O'Malley and Otto Becker, do hereby undertake, promise, and agree that if said judgment so appealed from should be affirmed we and

each of us shall produce the said Norman Markuson and his body to answer whatever decision the Supreme Court may render in the cause relative to the body of the said Norman Markuson and then and there abide the further order of said court, then this recognizance to be void; otherwise to remain in full force and virtue.

NORMAN MARKUSON. [SEAL.]
THOMAS O'MALLEY. [SEAL.]
OTTO BECKER. [SEAL.]

81 Taken and acknowledged before me the day and year above written.

[SEAL.] J. A. MONTGOMERY,
Clerk of the U. S. District Court for the District of North Dakota.

UNITED STATES DISTRICT COURT, *District of North Dakota,* } *ss:*

We, Thomas O'Malley and Otto Becker, do each solemnly swear that we are residents and freeholders of the State of North Dakota, and that after paying our just debts and liabilities we are each worth the sum of $4,000 in real estate within the jurisdiction of this court and subject to execution, levy, and sale.

THOMAS O'MALLEY.
OTTO BECKER.

Subscribed and sworn to before me this 31st day of March, A. D. 1898.

[SEAL.] J. A. MONTGOMERY,
Clerk U. S. District Court for the District of North Dakota.

The within recognizance and the sureties thereon are by me approved this 31st day of March, A. D. 1898.

CHARLES F. AMIDON,
Judge U. S. District Court, District of North Dakota.

82 On filing the within recognizance, approved by me, the clerk will issue his certificate, directed to the warden of the penitentiary of the State of North Dakota, reciting the orders made in the within-entitled proceeding relating to the — superseding the previous orders and judgment of this court and of the State court referred to in the petition pending the appeal, and providing for the release of said Norman Markuson pending such appeal.

Dated March 31st, 1898.

CHARLES F. AMIDON,
Judge U. S. District Court, District of North Dakota."

Upon the back of said bond and order appear indorsements in words and figures following, to wit:

"#18. United States district court, district of North Dakota. In the matter of the petition of Norman Markuson for his discharge on a writ of *habeas corpus.* Supersedeas bond and order. Filed Mar. 31, 1898. J. A. Montgomery, clerk, by E. R. Steele, deputy."

83 UNITED STATES OF AMERICA, } ss:
District of North Dakota, }

I, J. A. Montgomery, clerk of the district court of the United States for the district of North Dakota, do hereby certify that the foregoing pages, from one to eighty-two, contain true and faithful transcripts of all pleadings, process, and proceedings of record and on file in my office as said clerk, and the whole thereof and the indorsements thereon, "In the matter of the petition of Norman Markuson for a writ of *habeas corpus.*"

Witness my hand and the seal of said district court, at Fargo, North Dakota, this 20th day of April, A. D. 1898.

[Seal United States District Court, North Dakota.]

J. A. MONTGOMERY, *Clerk.*

[Endorsed:] No. —. United States district court, district of North Dakota. In the matter of the petition of Norman Markuson for a writ of *habeas corpus.* Transcript on appeal.

Endorsed on cover: Case No. 16,875. North Dakota D. C. U. S. Term No., 298. Norman Markuson, appellant, *vs.* N. F. Boucher, warden of the penitentiary of North Dakota, at Bismarck. Filed May 16th, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

NORMAN MARKUSON,

Appellant.

vs.

N. F. BOUCHER, Warden of the Penitentiary of North Dakota at Bismarck,

Respondent.

Appeal from the District Court of the United States for the District of North Dakota.

BRIEF AND ARGUMENT OF APPELLANT.

STATEMENT OF FACTS.

The appellant, Norman Markuson, a citizen of the United States and of the State of North Dakota was in June, 1897, proceeded against in that state

by an information filed in the state court by the state's attorney wherein Markuson was charged with the commission of a public offense, to-wit,—the crime of contempt of court, in that in certain proceeding for the enforcement of the prohibitory laws of said state against the sale of intoxicating liquors an injunctional order was issued and while the same was in force, Markuson, the defendant in that proceeding, with others, violated the injunction.

The information further charged that on June, 29th, 1895, the said Markuson had been convicted of criminal contempt under chapter 110 of the laws of 1890 of the State of North North. Upon this information an attachment was issued against Markuson by the State District Court in which the proceedings were pending, and he was brought before it to answer for the contempt. Thereupon, upon the 3rd day of August, 1897, he was arraigned before the judge of the district court of the fith judicial district for the county of Barnes in said state of North Dakota, and moved that the attachment be dismissed and quashed, because, first—that the search warrant set forth in the information directing the seizure of certain property, was contrary to provisions of section 18 of the constitution of North Dakota as being unreasonable, vague and indefinite, and not particularly describing the place to be searched, or the things to be seized. Again, because the provisions of Section 7605 of the Code of North Dakota under which the proceedings were had, are in conflict with Section 13 of the constitution of the state of North Dakota. Again, because there is another remedy

provided by the statute of North Dakota for the offense charged in the information.

He further demanded the right to plead and be tried by the laws regulating criminal contempt as defined by Article I, chapter 34, ot the Code of Civil Procedure,—and all of said motions were overruled.

Thereafter Markuson entered a plea of not guilty and thereupon in open court demanded a trial by jury, which demand was denied by the court and the defendant excepted to it. The court then proceeded to hear the case, and certain witnesses were examined therein, and certain documentary evidence was introduced, and thereafter the case being closed, the court made its findings of fact and conclusions of law.

And by the sixth finding of fact, found as follows,—"That the said defendant, Norman Markuson, was tried and found guilty and convicted on the 29th day of June, 1895, for violating the lawful provisions of a certain injunctional order issued by the judge of this court under and pursuant to Section 13 of Chapter 110 of the Laws of 1890 of the State of North Dakota, being section 7605 of the Revised Code of said State."

And as conclusions of law the court found,—"That said defendant, Norman Markuson, is guilty of criminal contempt of court as provided by Section 7605 of the Revised Code of the State of North Dakota, and that said contempt is and constitutes the second offense of contempt under and against

the provisions of Section 7605 of the Revised Code of the State of North Dakota."

And thereupon the court made the following order,—"It is hereby ordered that the judgment and sentence of the court be rendered and pronounced in open court in the presence and hearing of Norman Markuson and that the clerk enter the same upon the minutes of the court. The judgment and sentence against the said defendant Norman Markuson, is that he be imprisoned in the state penitentiary for the state of North Dakota for the period of one year. Let judgment be entered accordingly. By the court. S. L. Glaspell, Judge."

That thereafter and on the 6th day of August, 1897, the defendant perfected an appeal to the Supreme Court of the State of North Dakota and thereafter said supreme court duly and in all things affirmed said judgment, and thereupon and on the 7th day of December, 1897, the said Markuson was committed to and continued to be confined in the Penitentiary of said State of North Dakota at Bismarck of said state until the hearing upon the writ of habeas corpus issued herein by the United States District Court of the State of North Dakota, and until he was released on bail given on the appeal in this cause on the 31st day of March, 1898.

In the month of December, 1897, Markuson filed his petition in this case for a writ of habeas corpus and on the 26th day of January, 1898, by leave of the court, filed his amended petition for the

writ in which he says, that the statutes of the state of North Dakota providing for and regulating all proceedings which were enforced against him, are enacted, maintained and enforced in violation of the constitution of the United States, and particularly in violation of the Fifth Article of the Amendments to said Constitution of the United States, and in violation of the Sixth Article of the Amendments to the Constitution of the United States, and in violation of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States, in this, that said statutes and the proceedings had thereunder, operate and do abridge the privileges and immunities of citizens of the United States and deprive such citizens of liberty and property without due process of law, in that they deny to such citizens upon a criminal trial the right of trial by jury, and deny to said citizens within the jurisdiction of North Dakota the equal protection of the laws, in that, in and by said statutes it is provided that in prosecutions thereunder a conviction of contempt of court may be had without a trial by jury, and a defendant sentenced to the penitentiary of said state thereunder, whereas in all other criminal prosecutions the citizens of the United States within said state and all persons being found therein are entitled to a trial by jury. And further in this, that in such proceeding a contempt of court is punishable as an infamous crime whereas in all other proceeding a contempt of court is punishable only as and for a misdemeanor.

Other grounds and alleged violations of the constitutional privileges of the petitioner are alleged in

the said petition; and it is further averred therein that he is without means to sue out and prosecute an appeal or writ of error to this court and he thereupon prays for the issuance of the writ.

Upon this petition the writ of habeas corpus was duly issued, and having come on for hearing and determination before the United States District Court for the District of North Dakota, upon the 31st day of March, 1898, judgment was entered therein discharging the writ of habeas corpus and remanding the petitioner therein, Markuson, to the custody of N. F. Boucher, the warden of the State Penitentiary of North Dakota, and from such judgment and determination this appeal is taken.

BRIEF AND ARGUMENT.

Two questions are presented upon this appeal. First,—Does the conviction and sentence of the appellant by the courts of North Dakota for a felony and infamous crime without a trial by jury or a plea of guilty upon his part, violate the constitutional privileges secured to him under the constitution of the United States?

Second,—Is the proceding against the appellant under the statutes of North Dakota by means of which a contempt of court committed by a violation of the prohibitory laws of that state, adjudged to be an infamous crime, punishable by imprisonment in the penitentiary without giving to a defendant therein the right of a trial by jury, (whereas in all other

proceedings for contempt of court under the laws of the State of North Dakota, the offense is defined to be only a misdemeanor punishable by fine and imprisonment in the county jail), due process of law or a denial to any person within the jurisdiction of said state of the equal protection of the laws according to the provisions of Section 1, Article Fourteen of the Amendments to the Constitution of the United States?

Before passing to the argument of the particular questions involved we call the attention of the court to the general condition of the law antecedent to the occurrences herein complained of. The Fourteenth Amendment to the Constitution of the United States took effect on July 28th, 1868. At that time and from the territorial organization of the territory of North Dakota, and up to the first of October, 1889, North Dakota had been a territory of the United States. The Enabling Act of the State of North Dakota was approved February 22nd, 1889. Section 4 of the Enabling Act provides among other things that the "Constitution shall be Republican in form and make no distinction in civil or political rights on account of race, color, except as to Indians not taxed, and not to be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

Pursuant to the Enabling Act the people of North Dakota on the 1st day of October, 1889, adopted a constitution which was acceptable to

Congress. Among other provisions contained in that constitution are the following:—

"Article I, Section 3. The state of North Dakota is an inseparable part of the American union and the constitution of the United States is the supreme law of the land."

Section 6. "Nor shall cruel or unusual punishments be inflicted."

Section 7. "The right of trial by jury shall be secured to all, and remain inviolate; but a jury in civil cases, in courts not of record, may consist of less than twelve men, as may be prescribed by law."

Section 8. "Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in the time of war or public danger. In all other cases, offenses shall be prosecuted criminally by indictment or information. The Legislative Assembly may change, regulate or abolish the grand jury system."

Section 11. "All the laws of a general nature shall have a uniform operation."

Section 13. "In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be com-

pelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

Section 21. "The provisions of this constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise."

Section 24. "To guard against transgression of the high powers which have delegated, we declare that everything in this article is excepted out of the general powers of government and shall remain forever inviolate."

And in Article II of the Constitution it is provided,—Section 69. "The Legislative Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say,—* * * 21. For the punishment of crimes."

Section 70. "In all other cases where a general law can be made applicable, no special law shall be enacted; nor shall the Legislative Assembly indirectly enact such special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed." And upon the subject of the particular prosecution and proceedings herein before the court, the constitution ofthe State of North Dakota contains the following,—

Article XX, Section 217. "No person, association or corporation shall within this state, manufacture for sale or gift, any intoxicating liquors, and no person, association or corporation shall import any of the same for sale or gift, or keep or sell or offer the same for sale, or gift, barter or trade as a

beverage. The Legislative Assembly shall by law prescribe regulations for the enforcement of the provisons of this article and shall thereby provide suitable penalties for the violation thereof."

With this constitution existent and obligatory upon the legislature that body proceeded to pass certain acts intended to make effectual the prohibitory clause in the constitution which provided among other things that the proceeding to enforce such prohibition should be by bill in equity, that an injunctional order should issue in the first instance and further provides,—"Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt, for the first offense, by a fine of not less than two hundred dollars nor more than one thousand dollars and imprisonment in the county jail not less than ninety days nor more than one year, and for the second and every successive offense of contempt, by imprisonment in the penitentiary not exceeding two years and not less than one, in the discretion of the court or judge thereof."

Again, "The accused may plead in the same manner as to an information or indictment in so far as the same is applicable. Evidence may be oral or in the form of affidavits or both. The defendant may be *required to make answer to interrogatories either written or oral* as in the discretion of the court or a judge may seem proper." And again, "The practice in such contempt proceedings shall conform as nearly as may be to that adopted by the Ninetieth Rule of the Supreme Court of the United States

for proceedings in equity in the circuit courts." And this same statute denies to a defendant in such proceedings the right of trial by jury.—Statutes of North Dakota, Chapter 110, Laws of 1890.

The Supreme Court of North Dakota sustained as constitutional both under the constitution of that state and that of the United States, all of such proceedings.—*State vs. Markuson, 73 N. W. Rep. 82.* Under this condition of affairs what becomes of the right of trial by jury secured to all under section 7 of Article I of the constitution of the State of North Dakota? Section 217 of Article XX of the Constitution confers upon the Legislative Assembly the power to provide suitable penalties for the violation of that article. The prohibitory legislation of the State of North Dakota is authorized by the provisions of Article XX, and the penalties provided in that act must be enacted under the same article.

A provision of statute punishing a contempt of court in such proceedings must therefore be construed to be one of the penalties authorized for a violation of that article; and when that penalty creates an infamous crime and subjects the citizen to the consequences thereof, it would seem that such accused person would be entitled to the protection of Section 7, Article 1. of the same constitution.

This position may be summed up in the statement that the Legislature cannot do indirectly what it is forbidden to do directly. If the Legislature of North Dakota acting under their constitution can abrogate the right of trial by jury in criminal pro-

ceedings under the prohibitory statutes, they may, with equal propriety, abrogate the right of trial by jury in any other criminal proceeding. Yet section 7 of Article 1 says that the right of trial by jury shall be secured to all and remain inviolate.

Again, is it within the power of the Legislature of North Dakota to declare a contempt of court committed in proceedings to enforce the prohibitory article of the constitution, a felony, while a contempt of court committed in any other proceeding is merely a misdemeanor. It seems to us that such legislation savors of unequal legislation and is directly contrary to the constitutional provisions that have been cited upon that subject.

It may be that a thorough review of the constitution of the United States and of the construction placed upon it by this court may lead to the conclusion that such constitution does not guarantee to a citizen of the United States accused of felony or infamous crime the right of trial by jury, except only in the Federal tribunals. That in other words, the constitution of the United States in this respect protects its citizens only against its own courts and congressional legislation, and that it is powerless in this respect as against legislation or proceedings by the states. But if this is true, the large majority of our citizens have been mistaken in their view of the protection guaranteed to them by the constitution of the United States.

The following authorities seem to sustain the position that this legislation is clearly in violation of

the provisions of the constitution of North Dakota and of the Fourteenth Amendment to the Constitution of the United States. If it is it must be void, as the constitution of North Dakota so far as the rights and privileges of citizens of the United States are concerned is necessarily a compact with the United States and must secure to those citizens the rights and privileges to which they were entitled under the constitution of the United States at the time of the passing of the Enabling Act and the adoption of the Constitution of the State of North Dakota—*Frazer vs. McConway, &c., Co., 82 Fed. 257; In re Hong Wah, 82 Fed. 623; Sutton vs. State (Tenn.) 36 S. W. Rep. 697; Shaver vs. Pennsylvania Co., 71 Fed. 931;* 3rd Am. & Eng. Enc. of Law, bottom pages 714-15, and cases cited; *Ex. Parte* Grace, 12 Iowa, 208.

The next proposition we submit for the consideration of the court is that assuming the constitutional rights of the petitioner to have been violated and that he is in custody of the state authorities in violation of the constitution of the United States, is this proceeding by habeas corpus the proper remedy?

It appears in this case that the appellant has exhausted his remedies in the state courts including the highest court of the State of North Dakota. It also appears that in all of these proceedings he has steadfastly asserted what he claims to be his constitutional rights, and it also appears that in each step in the proceedings these asserted rights have been as constantly denied.

It also appeared that at the time of his application for the writ of habeas corpus that he was with-

out means to prosecute an appeal or writ of error from the Supreme Court of the state of North Dakota to this court. Under these circumstances we respectfully submit that the writ of habeas corpus is his proper and appropriate remedy, from a Federal court authorized to issue it; and upon this we cite the determination of this court in Re Neagle 135 U. S. 1.

We are fully aware of the expressions of this court in Whitton vs. Tomlinson, 160 U. S. 231, and Pepke vs. Cronnan, 155 U. S. 100; but we assert with great confidence that the doctrine established In Re Neagle, supra, has never been departed from or attenuated by any subsequent decision of this court, and that upon the question of life or liberty, the interests and rights of the humblest citizen of the United States, are fully upon a par and entitled to precisely the same consideration as that of a citizen of the United States who happens to be at the same time a Deputy Marshal of the United States.

We therefore conclude upon this point that the procedure which we have invoked is the proper one to enable us to be fully and completely heard and a proper conclusion and determination reached by this court.

Lastly, are the proceedings under consideration which have culminated in the confinement of this appellant in the penitentiary at Bismarck under a sentence thereto for one year, the exercise as against him of due process of law? That a sentence

to the penitentiary necessarily involves a conviction of the defendant for an infamous crime, is too well settled to require the citation of authorities.

That it is a felony appears by section 6804, Rev. Code of North Dakota, 1895.

That except upon a plea of guilty duly made in open court no person has ever been convicted of an infamous crime by the civil courts of the United States and that conviction sustained, is confidently asserted. And we challenge the production of any authority holding that such conviction is lawful,—except of course the determination of the Supreme Court of North Dakota.

That in proceedings as against the lives or liberties of citizens of the United States no court or legislation can effect indirectly that which it is powerless to effect directly, is a logical deduction and conclusion from the slightest examination our form of government and of the rights guaranteed to the citizens thereof.

That the particular means pointed out by this court for the assertion and vindication of these constitutional rights are to some extent varying and conflicting we are well aware, and that the expressions of this court upon this subject are to a certain extent contradictory and perhaps obscure may also be admitted. But when the question is fully, completely and fairly presented as in this case, it is believed that it will be met and determined as fully, decisively and clearly as its importance demands.

Considering the expression of this court in Marchant vs. Railroad Company, 153 U. S. 380, and

the cases cited; Hodgson vs. Vermont, advanced opinion October term, 1897, number 3, page 90; *Ex Parte* Converse, 137 U. S. 624; Hurtado vs. California, 110 U. S. 516, and that of the court of appeals in Benton vs. Platter, 10 U. S. App. 657, we do not think it can be fairly asserted that the porceedings of the court of North Dakota or the legislation upon which they are based can be considered due process of law.

The opinion of the Supreme Court of Massachusetts, Jones vs. Robbins, 8 Gray 329; Commonwealth vs. Horrigan, 127 Mass. 450, are to the like effect.

In Re Kemmler, 136 U. S. 436, the court says at page 448,—"As due process of law in the Fifth Amendment, referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the constitution of the United States, exercised within the limits therein prescribed and interpreted according to the principles of the common law, so in the Fourteenth Amendment the same words refer to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and in the administration of criminal justice requires that no different or higher punishment shall be imposed up-

on one man than is imposed upon all for like offenses."

And again in Re Converse, 137 U. S. 624, the court says at the bottom of page 631,—"We repeat as has been so often said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses."

Is this doctrine impinged upon by requiring a man to testify against himself? The offense here is contempt or court, yet this appellant is imprisoned for a year in the penitentiary, while his fellow citizens who commits the same offense, to-wit,—contempt of court in another proceeding is punished as for a misdemeanor.

Among the latest expressions of this court upon this general subject, the court says,—"We concede the proposition so earnestly urged on behalf of the plaintiff in error that by the Fourteeth Amendment is made the right and the consequent duty of this court, when a case has been duly brought before it, to inquire whether in the enactment and administration of the criminal laws of the state it is sought to arbitrarily deprive any person of his life, liberty or property, or to refuse him the equal protection of the laws and that such inquiry is not precluded or ended by the mere fact that the judgment complained of was reached by proceedings in a state court in pursuance of the provisions of a state statute. But we are contented to close this discussion by

quoting the language of this court in *Ex. Parte* Converse."—Hodgson vs. Vermont, advanced opinion, December 15, 1897, No. 3, opinion page 93.

The Supreme Court of North Dakota in affirming the conviction in this cause, uses the following language,—"While the statute expressly authorizes the punishment here inflicted and while constitutional courts recognize the legislative right to control their power to punish for contempt, so long as such control does not lessen the effectiveness of such power, yet the power itself is not derived from or in any manner dependent upon the statute. It is a necessary inherent power, and as shown in the former opinion, State vs. Markuson, 5 N. D. 147, this must be so or courts must abrogate their functions. And this power must include the right to punish to an extent that will secure obedience to its lawful orders, and as we in effect said in the former opinion, it is entirely immaterial whether this punishment falls within or beyond the limit that our statute fixes as a punishment for misdemeanors." State vs. Markuson, 73 N. W. Rep. 81.

If the opinion of the Supreme Court of North Dakota as to its inherent power is here correctly described, there is no limit upon that power. "And this power must include the right to punish to an extent which will secure obedience to its lawful orders,"—Where is the limit? Suppose that the Supreme Court of North Dakota, or any other record tribunal of that state, should conclude that death was a necessary punishment "to secure obedience to its lawful orders",—would that be considered due

process of law? And is it possible that the judgment of the court of North Dakota in this case depends upon and is pronounced by reason of "the inherent power" of that court. Was not the sentence pronounced and the punishment inflicted, the statutory sentence and punishment? And is it not conclusively presumed that the court in that proceeding was proceeding in accordance with the statute and not upon its inherent power"? Has any court of North Dakota "the inherent power" to compel a man to be a witness against himself; to answer any questions that the court may see fit to propound, either orally or in writing? Besides a practice of this character the proceedings in the Dreyfus case in Paris are commendable, intellibible and of exceeding regularity. But like those proceedings, the conclusions of the Supreme Court of North Dakota and the proceedings therein, are unknown, either to the common law or constitutional tribunals created and existing under the authority of the United States or the constitution of the several states.

The questions presented in Spies vs. Illinois, 123 U. S. 131, is entirely different. And in Eilenbecker vs. District Court of Plymouth County, 134 U. S. 31, merely holds that proceedings "According to common law for contempt of court are not subject to the right of trial by jury, and are due process of law within the meaning of the Fourteenth Amendment to the Constitntion." But at common law no person could be convicted of an infamous crime or felony by reason of committing a contempt of court, and the conviction in the Eilenbecker case was

merely for a misdemeanor. Beside, the proceeding in this case was wholly statutory.

But as against the expressions of this court in that case (Eilenbecker vs. District Court, etc.) we cite the expressions of this court in Re Naegle, supra, and also call the attention of the court to the following expression in the opinion in Eilenbecker vs. District Court, etc., supra, pages 39 and 40.—

"We might rest the case here; but the plaintiffs in error fall back upon the 'proposition that the statute of the Iowa Legislature concerning the Sale of liquors under which this injunction was issued, is itself void as depriving the parties of their property without due process of law. We are not prepared to say that this question arises in the present case. The principal suit in which the injunction was issued for the contempt of which these parties have been sentenced to imprisonment, and to pay a fine, has never been tried so far as this record shows. We do not know whether the parties demanded a trial by jury on the question of their guilty violation of that statute. We do not know that they would have been refused a trial by jury if they had demanded it Until the trial of that case has been had they are not injured by a refusal to grant them a jury trial. It is the well-settled doctrine of this court that a part of a statute may be void and the remainder may be valid. That part of this statute which declares that no person shall own or keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquors with intent to sell the same

within this state, and all the prohibitory clauses of the statute, have been held by this court to be within the constitutional powers of the state legislature."

There can hardly be any question at this day in the case at bar that an adoption of the argument just quoted would result in what would be, if committed by a defendant or appellant, an evasion of the question sought to be determined. Such conduct is not tolerated upon the part of parties defendant, and is not practiced by the court.

If under the peculiar proceedings provided for by the legislature of the state of North Dakota, the court after the commencement of the main action, abandons that, and by imprisoning the parties defendant in the penitentiary for acts committed *pendente lite*, thus terminates the proceeding; such a course is certainly as to such defendants, the main part of the action. And it is hardly a sufficient remedy to the citizen who has served his term of one or two years in the penitentiary, to advise him that after he comes out he may, in the main proceeding, attack the constutionality of the statute. We do not believe that in this case this court will adopt the view presented in the authority last cited.

It follows then, from what we have said, that the questions here presented, occur for the first time in the history of the administration of the law in the United States. That for the first time a citizen has been convicted of an infamous crime and felony without a plea of guilty or the intervention of a jury. That for the first

time a state has by its legislation upon the subject matter of the liberty of the citizen, deliberately violated the provisions of its own constitution as well as every right and tradition concerning the liberty of a citizen.

One last consideration we desire to earnestly urge upon the court, —and that is, the construction to be applied to Section 3 of Article 1 of the Constitution of the State of North Dakota. At the time of the adoption of the constitution of the said state, as we have pointed out, all of the present amendments to the Constitution of the United States were in force. This court had held and determined that the first ten amendments to the constitntion of the United States were applicable only to the proceedings in the Federal Courts, but they also held that the provisions of the Fourteenth Amendment were obligatory upon the states and state legislatures and tribunals.

However, as this may be, at the time of the adoption of the constitution of the state of North Dakota by the people of that state; the constitution of the United States, both the original document and the fifteen amendments thereto, were in full force and existence, and certainly formed but one document, except in so far as the application of the amendments to the states had been affected by the construction placed upon them by this court.

Now, while this state of facts existed, the State of North Dakota provided in its constitution, Article 1, section 3, "The State of North Dakota is an in-

separable part of the American union, and the constitution of the United States is the supreme law of the land. Does this article refer, by any fair construction, to the original constitution of the United States excluding the amendments, and, if so, what amendments does it exclude? By the words "the supreme law of the land" what did the people of North Dakota mean? Unquestionably, the law of their own land, the "law of the land" comprising the said State of North Dakota. They could not mean to declare in their constitution what "the law of the land" was, as either to the United States or to the other states of the union. The United States was their superior, the other states their equal.

They were legislating on the subject of their state, and if this section of Article I of that constitution means anything, it means that from the time of the adoption of the people of North Dakota of the constitution which they did adopt, that the constitution of the United States and all of the amendments to the constitution of the United States, was and is the "supreme law of the land" so far as North Dakota is concerned; certainly so far as personal, rights, privileges and liberties are concerned.

If it means what we say it does, the proceeding in this case has violated every right secured to a citizen or sought to be secured to a citizen by its adoption.

In People of New York, ex rel. Parke, et. al. vs. Roberts, Comptroller of the State of New York, advanced opinion of this court, November 22nd, 1898, No. 2, page 63, there appears in the opinion of Mr.

Justice Harlan on page 66 of the report, the following language,—"If this can be done in reference to liquors, it can be done with reference to all the products of a sister state, and in this mode one state can establish a complete system of non-intercourse in her commercial relations with all the other states of the Union."

Now we respectfully submit, that if in a proceeding to enforce the prohibition laws of the State of North Dakota the legislature of that state can declare an act in violation of such laws, criminally infamous and a felony, and proceed to award punishment by imprisonment in the penitentiary for a minimum period of one year therefor, without the intervention of a jury, indictment or information, and by compelling a party charged, to be a witness against himself, they can make the same provisions as to any other offense, either at common law or statutory. And can by this means deprive a citizen of the United States within their limits of every right secured to him, concerning his personal liberty, under an accusation of crime.

We are not urging upon this court a demand that the prohibitory liquor laws of the state of North Dakota; either constitutional or legislative, shall be declared to be void. This cause is not presented on behalf of the liquor traffic. We recognize fully the right of that state to provide any reasonable punishment for a violation of this law or any other laws that their legislature may constitutionally pass. But we do ask, that in proceedings through their courts for the punishment

of an offender they shall recognize the existence of the constitutional rights of such defendant, and proceed in the enforcement of their laws according to what are now recognized to be the fundamental principals of ordinary justice as applied to any prosecution of any character or description.

And it is submitted, that the order of the court below should be reversed, and the appellant should be discharged from custody.

C. D. O'BRIEN,
Counsel for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. [illegible]

NORMAN MARKUSON, Appellant,

vs.

N. F. BOUCHER, Warden of the Penitentiary of North Dakota at Bismarck, Respondent.

Appeal from the District Court of the United States for the District of North Dakota.

BRIEF AND ARGUMENT FOR RESPONDENT.

EDWARD WINTERER,

Status Atty and Counsel for Respondent.

1

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

2

No. 298.

NORMAN MARKUSON, Appellant,

vs.

N. F. BOUCHER, Warden of the Penitentiary of North Dakota at Bismarck, Respondent.

3

Appeal from the District Court of the United States for the District of North Dakota.

BRIEF AND ARGUMENT FOR RESPONDENT.

4

STATEMENT.

On the 29th day of June, A. D. 1895, the appellant, Norman Markuson, a citizen of the United States and of the State of North Dakota, was convicted of the crime of contempt of court for violating the lawful provisions of a certain injunc-

tional order issued by the judge of the district court in and for the fifth judicial district of the State of North Dakota, under and pursuant to section 13, of chapter 110 of the laws of 1890, of the State of North Dakota, being section 7605 of the Revised Codes of the said state.

That thereafter, and after said Norman Markuson had been punished for the first offense, the judge of the said district court of the State of North Dakota, on the 22nd day of June, 1896, issued a temporary injunctional order in the case of the State of North Dakota ex. rel. P. J. McClory, Assistant Attorney General, vs. Norman Markuson and Michael E. Murphy, pursuant and under said section 7605 of the Revised Codes of North Dakota, which said injunctional order was personally served upon said Norman Markuson on the 26th day of June, 1896. That after the said Norman Markuson had been served with said injunction, he with others, on said 26th day of June, violated the same.

On the 17th day of June, 1897, the states attorney for Barnes County, North Dakota, filed an information in the said district court, of the fifth judicial district, of the State of North Dakota, charging the said Norman Markuson with the commission of a public offense, to-wit:—

The crime of contempt of court, committed on the said 26th day of June, A. D. 1896, by violating the lawful provisions of the said injunctional order; and further charging that the said Norman Markuson had been convicted of criminal contempt under said section 13, chapter 110, laws of 1890, being section 7605, of the Revised Codes, on the 29th day of June, 1895. Thereupon and on the 17th day of June, 1897, an attachment was issued by the said state court against said Markuson and brought before it to answer to said charge. On the 3d day of August, 1897, the said Markuson was arraigned on said information before said state court, and by his attorneys moved that the information and attatchment be dismissed and quashed for the following reasons:—

First—That the search warrant issued in said action is contrary to section 18, of the constitution of North Dakota, in this, that it is unreasonable, vague and indefinite and does not particularly describe the place to be searched or the things to be seized; that it does not appear that said search warrant was executed and returned within ten days as by section 8471, Revised Codes, required, and that said section 7605 is in conflict with section 13 of the constitution of the state in

that it deprives a person of property without due process of law.

Second—That there is another remedy provided by statute for the offense charged in the information.

Third—That the information does not charge contempt as described in said section 7605.

Fourth—That the injunctional order exceeded the prayer of the complaint.

Fifth—That the defendant demands the right to plead and be tried by the laws regulating criminal contempt as defined by chapter 34, article 1, of the code of civil procedure of the State of North Dakota.

After the overruling of the said motions the said Markuson entered a plea of not guilty.

The said Markuson thereupon demanded a trial by jury, which request was denied by the court.

He was then placed upon trial without a jury. Evidence was introduced on the part of the state, and thereupon, the defendant voluntarily, and without being required to do so by the court, offered and introduced evidence on his own behalf. After hearing and considering the evidence, and on the 6th day of August, 1897, the said state

court found the said Norman Markuson guilty of criminal contempt of court as provided by section 7605 of the Revised Codes of the State of North Dakota, and that said contempt constituted a second offense under and against the provisions of the said section. Thereupon and on the 6th day of August, 1897, the said state court duly and in open court sentenced said Markuson to imprisonment in the state penitentiary at Bismarck, North Dakota, for a period of one year.

On the said 6th day of August the said Norman Markuson perfected an appeal to the supreme court of the State of North Dakota. The said state supreme court in all things affirmed the judgment of the said district court, and thereafter, on the 7th day of December, A. D. 1897, by virtue of said judgment, the said Norman Markuson was duly committed to the state penitentiary of the State of North Dakota, at Bismarck, and confined therein.

On the 3d day of January, 1898, said Markuson filed with the United States district court for the district of North Dakota, his petition for a writ of habeas corpus, in which said petition he alleges that he was committed to said state penitentiary under and pursuant to proceedings had against him under section 7605 of the Revised

Codes of the State of North Dakota, and that said statutes are in violation of the constitution of the United States and particularly of articles five and six of said constitution. This was the first time that he specifically claimed the proceedings had against him to be in violation of the constitution of the United States. No such claim was expressly made in the state courts.

Thereupon the Hon. Chas. F. Amidon, the judge of the said United States district court, issued the writ of habeas corpus and the same was duly returned by N. F. Boucher, warden of the said state penitentiary, on the 25th day of January, 1898.

On the said 25th day of January, 1898, the said N. F. Boucher moved the court to quash the petition of said Norman Markuson and dismiss the writ of habeas corpus herein issued. Which said motion was by the said court overruled.

Thereupon, said Markuson by his attorney filed an amended petition, by permission of court, in which amended petition, the said Markuson further claims that the proceedings had against him in the state court were in violation of the 14th amendment of the constitution of the United States. After hearing certain evidence and the argument of counsel the Hon. Chas. F. Amidon,

judge of the said district court of the United States, on the 31st day of March, 1898, entered judgment, discharging the said writ of habeas corpus and remanding the petitioner Markuson to the custody of N. F. Boucher, the warden of said state penitentiary. 25

Thereupon and on the said 31st day of March, 1898, the said Markuson perfected an appeal to this court from said judgment discharging said writ. 26

BRIEF AND ARGUMENT.

The appellant, Norman Markuson, contends that the district court of the United States for the district of North Dakota erred in discharging the writ of habeas corpus and holding and adjudging that his imprisonment in the penitentiary of the State of North Dakota, for the period of one year is not contrary to law and the constitution of the United States. He claims his imprisonment to be in violation of the federal constitution in the following particulars:— 27 28

First—In violation of article five of the amendments to said constitution of the United States in that he was tried and convicted without presentment or indictment of grand jury.

29 Second—In violation of article six of said amendments in that he was tried without an impartial jury of the state and district in which the crime was committed.

Third—In violation of article six of said amendments in that section 7605 of the Revised
30 Codes of the State of North Dakota under which petitioner Markuson was convicted, permits the trial and conviction of one accused of crime without being confronted with the witnesses against him.

Fourth—In violation of section 1, of the 14th amendment to said constitution, in that said
31 state statutes and the proceedings provided for thereunder, abridge the privileges and immunities of citizens of the United States.

Fifth--In violation of said section of the 14th amendment because said statutes and proceedings deprive such citizens of liberty without
32 due process of law in that they deny to such citizens upon a criminal trial the right of trial by jury.

Sixth—In violation of said section of the 14th amendment in that said statutes and proceedings deny such citizens within the State of North Dakota the equal protection of the laws,

for the reason, that in proceedings under said 33
state statutes a contempt of court is punishable as an infamous crime, whereas in all other proceedings a contempt of court is punishable only as and for a misdemeanor.

Before considering these six propositions in their order it will be necessary to dispose of the 34
following questions which present themselves for consideration at the beginning:—

Under the facts as alleged in the petition is this proceeding by writ of habeas corpus the proper remedy?

It is clear from an examination of the record in 35
the proceedings had against the appellant Markuson in the district court of the fifth judicial district of North Dakota, that the said state court had jurisdiction to issue the injunctional order in the case of The State of North Dakota ex. rel. P. J. McClory vs. Norman Markuson et. 36
al., and it is also clear that the said state court had jurisdiction of the offense for its violation. The said state court had jurisdiction of the subject matter and also of the person of the defendant Markuson in both the civil action and criminal proceeding. The jurisdiction of the state court is questioned by the appellant virtually in

but one respect:—as to the nature and extent of the punishment, to-wit:—imprisonment in the state penitentiary for one year. It would seem that if the said state court had jurisdiction to try appellant on the charge of contempt of court without the intervention of a jury, and to punish him as for a misdemeanor, in the county jail for a period of six months or one year, that a punishment by imprisonment in the state penitentiary for the same period would constitute simply a difference as to the amount of punishment. If the punishment be harsh or excessive, it would simply be a matter of error and the judgment would not be void for want of jurisdiction. And unless the judgment of conviction be void for want of jurisdiction it cannot be attacked, collaterally, in habeas corpus proceedings.

In re Greenwald, 77 Fed. 590;
In re King, 51 Fed. 434;
In re Boyd, 49 Fed. 48;
Ex. Parte Reed, 100 U. S. 23;
Stevens vs. Fuller, 136 U. S. 498; 10 Sup. Ct. Rep. 911;

In Ex. Parte Frederich, 149 U. S. 70; 13 Sup. Ct. Rep. 793, Mr. Justice Jackson speaking of the distinction of an erroneous judgment and one wholly void, says:—"The reason of this rule lies in the fact

that a habeas corpus proceeding is a collateral attack, of a civil nature, to impeach the validity of a judgment or sentence of another court in a criminal proceeding, and it should therefore be limited to cases in which the judgment or sentence attacked is clearly void, by reason of its having been rendered without jurisdiction, or by reason of the court's having exceeded its jurisdiction in the premises."

The writ of habeas corpus is not a proceeding for the correction of errors, and cannot be used as a substitute for a writ of error.

Ex. Parte Lange, 18 Wall. 163;
Ex. Parte Siebold, 100 U. S. 371;
Ex. Parte Curtis, 106 U. S. 371; 1 Sup. Ct. Rep. 381;
Ex. Parte Royall, 117 U. S. 241; 6 Sup. Ct. Rep. 734;
Ex. Parte Frederich, supra;
In re. Snow, 120 U. S. 274; 7 Sup. Ct. Rep. 556;
Stevens vs. Fuller, 136 U. S. 468, 10 Sup. Ct. Rep. 911.

The appellant made no claim in the district oourt for the fifth judicial district of the State of North Dakota that the proceedings therein had

against him were in violation of the constitution of the United States, and such claim was not made by him in the supreme court of the state. The record is wholly silent as to any specific claim of a federal question. Appellant's demand for a trial by jury was made under section 7 of the constitution of the state. (Transcript of Record, page 38, fol. 65.) The first time that he asserted that such proceedings were in violation of the constitution of the United States is in his application for a writ of habeas corpus. It would seem, therefore, that as this matter was not presented directly to the state court for its determination, that a proceeding by writ of habeas corpus would tend to hinder and obstruct the state in the execution of the judgments of its courts. That if the question had been submitted to the supreme court of the state and determined adversely to the appellant, in the absence of exceptional and urgent circumstances, this question should be reviewed in the supreme court of the United States on a writ of error. Such is clearly the rule as expressed in

State of New York vs. Eno., 155 U. S. 89; 15 Sup. Ct. Rep. 30;

Bergmann vs. Backer, 157 U. S. 655; 15 Sup. Ct. Rep. 727;

Ex. Parte Royall, 117 U. S. 241; 6 Sup. Ct. Rep. 734; 49

Andrews vs. Schwarts, 156 U. S. 272; 15 Sup. Ct. Rep. 389;

Ex. Parte Fonda, 117 U. S. 516; 6 Sup. Ct. Rep. 848;

Re. Duncan, 139 U. S. 449, 11 Sup. Ct. Rep. 573; 50

Re. Wood, 140 U. S. 278; 11 Sup. Ct. Rep. 738;

Cook vs. Hart, 146 U. S. 183; 13 Sup. Ct. Rep. 40.

Re. Fredrich, 149 U. S. 70; 13 Sup. Ct. Rep. 793;

Pepke vs. Cronan, 155 U. S. 100; 15 Sup. Ct. Rep. 34; 51

Tinsley vs. Andersen, 171 U. S. 101; 18 Sup. Ct. Rep. 805.

Appellant alleges in his petition as a reason for the necessity and urgency for the issue of the writ that he is in straitened circumstances. It is apparent, however, that if he is able to prosecute this appeal he would also be able to prosecute and sue out a writ of error. Want of means to proceed by writ of error cannot be considered an exceptional or urgent case which would war- 52

53 rant a summary proceeding by writ of habeas corpus as such a decision would constitute a discrimination simply on the basis of wealth and violate the constitutional provision that all citizens are entitled to the equal protection of the laws. We cannot find that this court has deemed poverty such an exceptional circumstance which
54 in itself would authorize a review by writ of habeas corpus.

His claim that a writ of error could not be brought on for hearing until his term of imprisonment would expire is without force for the reason that the offense is bailable under the laws of the
55 State of North Dakota. Section 6, constitution of North Dakota. Section 8447, Revised Codes, North Dakota. And under section 1017 of the Revised Statutes of the United States he could be released on bail pending the appeal. The case presents no special circumstances requiring immediate or urgent action. Under the decision of
56 this court in the case of Whitten vs. Tomlinson, 160 U. S. 231, 16 Sup. Ct. Rep. 298, the proceeding by writ of habeas corpus is not the proper remedy.

In the case of Ex. Parte Royall the court says: "Where a person is in custody under process from a state court of original jurisdiction, for an alleged

offense against the laws of such state, and it is 57
claimed that he is restrained of his liberty in violation of the constitution of the United States, the circuit court has a discretion whether it will discharge him, upon habeas corpus, in advance of his trial in the court in which he is indicted, that discretion, however, to be subordinated to any 58
special circumstances requiring immediate action. When the state court shall have finally acted on the case, the circuit court has still a discretion, whether, under all of the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed, by writ of 59
habeas corpus, summarily to determine, whether, the petitioner is restrained of his liberty in violation of the constitution of the United States."

In re. Neagle, 135 U. S. 1, the special and exceptional circumstances grew out of and involved the authority and operations of the national gov- 60
ernment, as the crime with which the petitioner was charged by the State of California was committed by him while in the performance of a duty imposed upon him by the laws and constitution of the United States. This is also true In re Loney, 134 U. S. 372, 10 Sup. Ct. Rep. 584. The matter of urgency in Widdenhus Case, 120 U.S. 1:

61 385, involved the relations and 7 Sup. Ct. Rep.
obligations of the United States with a foreign country.

Does the petition, as amended, allege sufficient facts to warrant the issue of the writ?

Section 754 of the Revised Statutes of the
62 United States requires that the petition for writ of habeas corpus shall set forth "The facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known."

Section 755 of said Statutes provides that the
63 court shall issue the writ, "unless it appears from the petition itself that the party is not entitled thereto."

It would appear, from the provisions of these statutes, that the petition should allege sufficient facts to make a prima facie case and to show that
64 the judgment or sentence under which the petitioner is held and restrained is void for want of jurisdiction and that such judgment is in violation of the constitution of the United States. The petition in this proceeding is defective in that it does not distinctly allege the offense with which the petitioner was charged and for which he was convicted and committed, or that he was convict-

ed of any particular crime. Presumably and 65
inferentially contempt of court. It does not show
that he demanded a trial by jury and was denied
such request.

The petition alleges that the proceedings had
against him—and it does not show just what
those proceedings were—were conducted under 66
and pursuant to section 7605 of the Revised Codes
of the State of North Dakota and of the other
statutes of the said state concerning and regulat-
ing said procedure, and that said statutes and
proceedings are in violation of the constitution
of the United States. The original petition
under which the writ issued does not even 67
allege that such statutes and proceedings are
in violation of the 14th amendment of the federal
constitution. It does not show specifically and
in what respect the petitioner was denied or
deprived of any right under the laws or con-
stitution of the United States. It is sought
to show that the statutes are unconstitutional, 68
but in what respect the petitioner himself was
denied any constitutional right under the state
statutes is not clearly set forth. It is impossible
to determine from the petition itself a want of
jurisdiction in the state court and that the pro-

69 ceedings had against him were actually in violation of the constitution of the United States.

The general allegations that such statutes and proceedings are in violation of the constitution of the United States are merely averments of conclusions of law and not of facts.

70 In Cuddy's Case, 131 U. S. 280, 9 Sup. Ct. Rep. 703, this court holds that—"the general allegations in the petition that the petitioner is detained in violation of the constitution and laws of the United States and of the constitution and laws of the particular state, and is held without due process of law, are averments of mere conclusions of
71 law and not of matters of fact."

We quote the language of Mr. Chief Justice Fuller in the recent case of Craemer vs. State of Washington, 168 U. S. 124; 18 Sup. Ct. Rep. 1. "The general rule is undoubted that if the detention is claimed to be unlawful by reason of the
72 invalidity of the process or proceedings under which the party is held in custody, copies of such process or proceedings must be annexed to or the essential parts thereof set out in the petition and mere averments of conclusions of law are necessarily inadequate."

And again in the case of Whitten vs. Tomlin-

son, supra, this court speaking of the petition for writ of habeas corpus says:—"But no allegation of fact in the petition can be assumed to be admitted unless distinct and unambiguous." 73

Kohl vs. Lehlbeck, 160 U. S. 293; 16 Sup. Ct. Rep. 304;
Church Hab. Corp. (2nd Ed.) section 91. 74

The motion to quash the petition and discharge the writ was made by the appellee Boucher before the introduction of any evidence. See transcript record, page 14, fol. 20; same, page 18, fol. 28, and hence the record subsequently introduced cannot be held to cure the defects in the petition. 75

Under these circumstances and the decisions of this court the petition would seem to be fatally defective.

It will be best to consider in regular order the various points and particulars in which the appellant Markuson claims that he is restrained of his liberty in violation of the constitution of the United States. 76

First—Is his imprisonment in violation of article five of the federal constitution in that he was tried and convicted without presentment or indictment of a grand jury?

77 Second—Is it in violation of article six of said amendments in that he was tried without an impartial jury of the state and district in which the crime was committed?

Third—Is it in violation of article six of said amendments in that section 7605 of the Revised
78 Codes of the State of North Dakota permits the trial and conviction of one accused of crime without being confronted with the witnesses against him?

These three questions can be answered and disposed of at once through the fact that the first twelve amendments of the constitution of the
79 United States refer exclusively to the government of the United States and place no limitations whatever upon the states. This has been so well settled by a long line of decisions of this court that it is not now an open question.

Twitchell vs. Commonwealth, 7 Wall. 321;
80 Smith vs. Maryland, 18 How. 76;
Withers vs. Buckley, 20 How. 90;
Pearson vs. Yeadall, 95 U. S., 294;
Gibbons vs. Ogden, 9 Wheat 1, 203;
John Barton et. al. vs. Baltimore, 7 Peters 243;
New York vs. Miln, 11 Peters, 102, 139;
U. S. vs. Dewitt, 9 Wall 41;

Purvear vs. Commonwealth, 5 Wall 475; 81
Cooley on Const. Limitations, Fifth Ed. 26.

It is argued by counsel for appellant Markuson that all of the amendments of the constitution of the United States refer to and are binding upon the State of North Dakota, for the reason that by article 1, section 3, constitution of North Dakota, 82 which provides that "The State of North Dakota is an inseparable part of the American Union and the constitution of the United States is the supreme law of the land," the whole constitution of the United States, and all of its amendments, by virtue of said article 1, section 3, became the supreme law of the land in North Dakota. That 83 the said amendments were thereby made a part of the constitution of the state and became part and parcel of it. Assuming this reasoning to be correct, as far as the state constitution is concerned, it would have no bearing on this case. The question presented for determination in this court, is 84 not what constitutes the constitution of the state of North Dakota, and what state statutes may or may not be valid under the said state constitution, but how far the constitution of the United States places a limit upon the constitution and laws of the state. The state statutes under consideration were held to be in harmony with the state con-

85 stitution by the supreme court of the state in the cases of State vs. Markuson, 73 N. W. Rep. 82, and State vs. Markuson, 64 N. W. Rep. 147.

It is impossible for a state by its constitution to extend the application of the constitution of the United States so as to place such state upon a
86 different and unequal footing with other states in the union. The argument of counsel seems to be that the first eight amendments to the constitution of the United States apply to the state of North Dakota, but not to any other state. That the state by its constitution has voluntarily placed itself on such unequal footing. Such is not the
87 language of the enabling act which provided that the state "shall be deemed admitted by congress into the union, under and by virtue of this act, on an equal footing with the original states from and after the date of said proclamation."

The reasoning of counsel is opposed to the
88 theory and nature of the union of the states and contrary to the express provisions and spirit of the constitution itself. A citizen of the United States in the State of North Dakota can have no greater rights under the federal constitution than such citizen in any other state. There is but one constitution of the United States and it bears and

operates alike upon all the states and all the citizens of such states. 89

Fourth—Is the appellant restrained of his liberty in violation of section 1, of the 14th amendment of the United States constitution, in that said state statutes and the proceedings had thereunder abridge the privileges and immunities of citizens of the United States? 90

The right of trial by jury is not a privilege of a citizen of the United States, except in United States courts. The privileges and immunities of citizens of the United States are such privileges and immunities as such citizens derive from the constitution of the United States, and this constitution does not give him the right or privilege of having a jury trial in criminal prosecutions in state courts. 91

We quote from the language of Chief Justice Waite in Walker vs. Sauvinet, 92 U. S. 90, "A trial by jury in suits at common law in the state courts is not a privilege or immunity of national citizenship which the states are forbidden by the 14th amendment to abridge." 92

State vs. Bates, 47 Pac. Rep. 78.

Before the adoption of the 14th amendment a citizen of the United States did not possess the

93 privilege of having a jury trial in state courts unless given by the state constitution, and the said 14th amendment does not give United States citizens any new privileges and immunities.

United States vs. Cruikshank, 92 U. S. 542;

94 Neither can it be contended on the part of the petitioner that the right to sell intoxicating liquors or to keep a place where such liquors are sold in violation of the state laws is a privilege guaranteed him under the said 14th amendment.

Barbemeyer vs. State of Iowa, 18 Wall 129;

95 The objection of appellant relates to the want of jury trial and the severe punishment meted out to him for a violation of the injunctional order. But such severe punishment, held not to be cruel or unusual by the supreme court of the state, does not abridge his privileges or immunities under the federal constitution.

96 McElvaine vs. Brush, 142 U. S. 155;
In re Kemmler, 136 U. S. 436; 10 Sup. Ct. Rep. 930.
State vs. Markuson, 73 N. W. 82.
State vs. Markuson, 64 N. W. 935.

Fifth—Do said state statutes and the proceed-

ings provided for thereunder, deprive citizens of 97
the United States of liberty without due process of law, in that they deny to such citizens upon a criminal trial the right of trial by jury?

The constitution of the United States does not limit the right of the states to regulate their own criminal procedure and a conviction in a state 98
court, according to the state law is with due process of law. This proposition is clearly substantiated in the case of Eilenbacker et. al. vs. District Court of Plymouth County, 134 U. S. 31; 10 Sup. Ct. Rep. 424. The court said: "Under Acts 20th General Assembly Iowa, c. 143, section 12, authorizing an injunction to restrain the illegal 99
sale of intoxicating liquors and providing that a person violating such injunction shall be punished for the contempt by fine or imprisonment, or both, in the discretion of the court, summary proceedings by a state court, imposing a fine or imprisonment for contempt in violating such an injunction issued by it, without presentment or indictment, 100
or trial by jury, are due process of law within the meaning of the constitution U. S. Article 14."

In Hurtado vs. People of California, 110 U. S. 516, 4 Sup. Ct. Rep. 111, it was held that the words "due process of law" in the 14th amendment of the constitution of the United States do not necessarily require an indictment by a grand

jury in a prosecution by a state for murder. Mr. Justice Mathews in the very able opinion of the court says: "We are to construe this phrase in the fourteenth amendment by the usus loquendi of the constitution itself. The same words are contained in the 5th amendment.* * * The conclusion is equally irresitable that when the same phrase was employed in the 14th amendment to restrain the action of the states it was used in the same sense and with no greater extent. And that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states it would have embodied, as did the 5th amendment, express declarations to that effect. Due process of law in the latter refers to the law of the land which derives its authority from the legislative powers conferred upon congress by the constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the 14th amendment, by parity of reasons it refers to the law of the land in each state which derives its authority from the inherent and reserved powers of the state exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides

in the right of the people to make their own laws 105
and alter them at pleasure." "The 14th amend-
ment" as was said by Mr. Justice Bradley in
Missouri vs. Lewis 101 U. S. 22, "does not pro-
fess to secure to all persons in the United States
the benefit of the same laws and the same reme-
dies. Great diversities in these respects may
exist in two states separated only by an imagin- 106
ary line. On one side of this line there may be a
right of trial by jury and on the other side no
such right. Each state prescribes its own mode
of judicial proceeding."

We quote the language of Mr. Chief Justice
Fuller, in Leeper vs. State of Texas, 139 U. S. 107
462, 11 Sup. Ct. Rep. 577, on this same matter:
"That by the 14th amendment the powers of the
state in dealing with crime within their borders
are not limited, except that no state can deprive
particular persons, or classes of persons, of equal
and impartial justice under the law. That law 108
in its regular course of administration through
courts of justice is due process, and when secured
by the law of the state the constitutional require-
ment is satisfied; and due process is so secured by
laws operating on all alike, and not subjecting
the individual to the arbitrary exercise of the
powers of the government unrestrained by the

109 established principles of private right and distributive justice."

Ex parte Converse, 136 U. S. 624; 11 Sup. Ct. Rep. 191;
In re Mahon, 34 Fed. 525;
In re Krug, 79 Fed. 308.

110

Again in Iowa Cent. Co. vs. Iowa, 160 U. S. 389, 16 Sup. Ct. Rep. 344, Mr. Justice White says: "This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of
111 action, instead of another. It is also equally evident, provided the form prescribed by the state law gives notice and affords an opportunity to be heard that the question of whether it was by a motion or ordinary action in no way rendered the proceeding not 'due process of law' within the constitutional meaning of these words."

112

Again, quoting from the language of Mr. Chief Justice Waite in Walker vs. Sauvinet, "A state cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in state courts affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is

had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state."

In harmony with these decisions we cite the following cases:

Tinsley vs. Andersen, 171 U. S. 101; 18 Sup. Ct. Rep. 805;

Baldwin vs. Kansas, 129 U. S. 52; 9 Sup. Ct. Rep. 193;

In re Kemmler, 136 U. S, 436; 10 Sup. Ct. Rep. 930;

Arrowsmith vs. Harmoning, 118 U. S. 194; 6 Sup. Ct. Rep. 1023;

Moore vs. State of Missouri, 16 Sup. Ct. Rep. 179;

Caldwell vs. Texas, 137 U. S. 692; 11 Sup. Ct. Rep. 224;

Lowe vs. State of Kansas, 163 U. S. 81; 16 Sup. Ct. Rep. 1031;

Hallinger vs. Davis, 146 U. S. 314; 13 Sup. Ct. Rep. 105;

Missouri vs. LeWis, 101 U. S. 22;

Davidson vs. New Orleans, 96 U. S. 97;

Murrays Lessee vs. Improvement Co., 18 Howard, 272;

117 Ex Parte Wall, 107 U. S. 288; 2 Sup. Ct. Rep. 569.

Kannard vs Lousiana ex. rel., 92 U. S. 480;

Munn vs. Ill., 94 U. S. 113;

Rowan vs. State, 30 Wis. 129, a well considered case and cited with approval in Hurtado vs. California, supra.

118 McNulty vs. People of California, 149 U. S. 645; 13 Sup. Ct. Rep. 959.

Bergeman vs. Backer, 157 U. S. 655; 15 Sup. Ct. Rep. 727;

Ex Parte Harding, 120 U. S. 782; 7 Sup. Ct. Rep. 780.

119

It is strenously contended by counsel that the proceedings had against appellant Markuson were not due process of law in that he was sentenced to the penitentiary. That the amount, extent and nature of the punishment itself, as distin-
120 guished from the proceedings or trial proper, related back, as it seems, to such trial and proceedings and made the same void as against due process of law. Although the meaning of the phrase "due process of law" has not been precisely defined and limited, still it is quite clear that it refers to the inquiry, proceeding, or trial, as distinguished from its results. It is defined

by this court in the case of Pennoyer vs. Neff, 121
95 U. S. 715, as a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights.

The extent of punishment is not limited by the constitutional provision of due process of law, but 122
by the provision against cruel and unusual punishments. This provision in the federal constitution does not refer to the states. The supreme court of North Dakota held that this provision, section 6, article 1, of the state constitution, was not violated by the proceedings had against the appellant Markuson. In State vs. Markuson, 64 N. W. 123
Rep. 935, the state supreme court said: "And when so punished the amount of punishment rests in the discretion of the court, uncontrolled by the statute which prescribes the punishment for misdemeanors and limited only by the constitutional provision against cruel and unusual punishments." This decision was adhered to by that court in 124
State vs. Markuson, 73 N. W. Rep. 82.

This decision of the supreme court of North Dakota is conclusive upon this court as held by it in the case of McIlvaine vs. Brush, supra, and In re Kemmler, supra. It was also held by this court in said two cases that the imposition of

cruel and unusual punishments by a state is not included in and prohibited by the term "due process of law" in the 14th amendment of the constitution of the United States.

The appellant was in fact accorded all the rights and privileges of any defendant in a criminal proceeding except trial by jury. He was not required to be a witness against himself. The statute in question does not require it. "The accused may plead in the same manner as to an information or indictment, in so far as the same is applicable. Evidence may be oral or in the form of affidavits, or both; the defendant may be required to make answer to interrogatories, either written or oral, as in the discretion of the court or judge may seem proper; the defendant shall not necessarily be discharged upon his denial of the facts stated in the moving papers; the clerk of the court shall, upon application of either party, issue subpoenas for witnesses, and except as above set forth, the practice in such contempt proceedings shall conform as nearly as may be to that adopted by the ninetieth rule of the supreme court of the United States for proceedings in equity in the circuit courts."

The answer to interrogatories means the same as to plead to the information or indictment. As

a matter of fact, (Transcript Record page 28, fol. 48) he pleaded not guilty to the information and testified voluntarily in his own behalf. (Transcript Record page 33, fol. 55½). 129

It is a well established and wholesome rule of law that no one can take advantage of the constitutionality of an independent provision of law who has no interest in and is not affected by such provision. 130

Del Castillo vs. McConnico, 168 U. S. 674; 18 Sup. Ct. Rep. 233;
State vs. Becker, 51 N. W. Rep. 1018;
Williams vs. State of Miss., 170 U. S. 213, 18 Sup. Ct. Rep. 583; 131
State vs. Snow, 3 R. I. 64;
Stickrod vs. Co. (Ky). 5 S. W. Rep. 580;
Sinclair vs. Jackson, 8 Cowan, 543.

As appellant was not obliged to testify against himself, the clause in the said statute has no bearing on this case. 132

Counsel further intimates that appellant has been convicted of an infamous crime by a civil court. We cannot assent to this proposition. It is true that the injunction was issued in a civil action. But the trial of appellant for contempt

133 for violating such injunction is a separate and distinctly criminal proceeding prosecuted by the State of North Dakota as in other criminal actions. Under section 103 of the state constitution the trial court has original jurisdiction in all cases at law and in equity with power to issue an injunction. It has inherent power to punish for contempt, and
134 such punishment must be adequate to compel obedience to its lawful orders, and limited only by the constitutional provision of the state against cruel and unusual punishments, and it matters not whether such punishment amounts to that provided for a felony. State vs. Markuson supra, (both cases).

135 Proceedings for contempt of court are not subject to the right of trial by jury and the infliction of punishment under section 7605 of the Revised Codes of North Dakota for such contempt does not violate the guaranty of jury trial under the constitution of the State of North Dakota or the
136 constitution of the United States.

We contend, that even if the constitution of the United States in specific and express terms extended to appellant Markuson the right of trial by jury in the state courts, in the same manner and form as it does in United States courts, still he would not be entitled, under the constitution, to a trial by jury in contempt proceedings.

Says Mr. Justice Miller in Eilenbacker vs. 137
Plymouth County, supra, "If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury we have been unable to find any instance of it. It has always been one of the attributes, one of the powers necessarily incident to a court of justice, that it 138
should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power." And further, "We simply hold that whatever its nature may be it is an offense against the court and against the administration of justice for 139
which courts always have had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the 14th amendment of the constitution."

This has been the ruling of this court in a long 140
line of cases, without qualification or limitation as to the amount of punishment imposed, whether such punishment be greater or less than that provided for a statutory felony.

In re Debs, 158 U. S. 564, 15 Sup. Ct. Rep. 900;

141 Ex Parte Terry, 128 U. S. 289, 9 Sup. Ct. Rep. 77;

Anderson vs. Dunn, 6 Wheat. 204, 227;

Ex Parte Savin, 131 U. S. 267, 9 Sup. Ct. Rep. 699;

Ex Parte Cuddy, 131 U. S. 280, 9 Sup. Ct. Rep. 703;

142 Ex Parte Robinson, 19 Wall. 505;

U. S. vs. Hudson, 7 Cranch, 34;

Mugler vs. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273;

Commission vs. Brimson 154, U. S. 447, 4 Sup. Ct. Rep. 1125;

Tinsley vs. Andersen, supra.

143 The decisions are uniform in this respect. It is impossible to find an exception.

State vs. Markuson, 73 N. W. Rep. 82 (N. D.) judgment involved in this case.

Cartwright's Case, 114 Mass. 230;

State vs. Markuson, 64 N. W. 935, (N. D.)

144 Ex Parte Grace, 12 Iowa, 208;

Neal vs. State, 9 Ark. 259;

State vs. Mathews, 37 N. H. 450;

State vs. Frew, 24, W. Va. 416;

State vs. Calugerty, (W. Va.) 10 S. E. Rep. 407;

Hughes vs. People, 5 Col. 436;

People vs. Wilson, 64 Ill. 195;

Batchelder vs. Moore, 42 Cal. 415; 145
Wyatt vs. People. 28 Pac. Rep. 961;
Arnold vs. Com. 44 Am. Rep. 480;
4 Blacks Com. Ch. 20;
3 Am. & Eng. Ency. Law, 721;
5 Crim. Law, Mag. 515;
Garrigus vs. State, 93 Ind. 239;
State vs. Doty, 90 Am. Dec. 671; 146
State vs. Becht, 23 Minn. 411;
State vs. Merrill, 16 Ark. 403;
Watson vs. Williams, 36 Miss. 331;
Cooley Cons. Lim., 5th Ed. 390-note;
King vs. Almon, 8 St. Trials 53;
Respublica vs. Oswald, 1 Dall, 319, 1 Am. Dec. 246; 147
Mariner vs. Dyer, 2 Me. 165;
Morrison vs. McDonald, 21 Me. 550;
Yates vs. Lansing, 6 Am. Dec. 290;
Sanders vs. Metcalf, 1 Tenn. Ch. 419;
Clark vs. People, 1 Ill. 340, 12 Am. Dec. 177;
Ex Parte Adams, 25 Miss. 883; 148
State vs. Copp, 15 N. H. 212;
Middlebrook vs. State, 43 Conn. 259.

Sixth—Do said state statutes and the proceedings provided for thereunder deny citizens of the United States the equal protection of the laws, in that under said statutes and proceedings con-

tempt of court is punishable as an infamous crime without trial by jury, whereas in all other proceedings under the state laws a contempt of court is punishable only as and for a misdemeanor?

The 14th amendment of the constitution of the United States merely requires that all persons subjected to legislation shall be treated alike under like circumstances and conditions, both in the liabilities imposed and the privileges conferred. Appellant claims that he was denied the equal protection of the laws as against other citizens because section 7605, supra, fixes the punishment for the second offense for violating an injunction issued under its provisions at imprisonment in the state penitentiary for one year, while punishment for any other offense of contempt of court under the state laws is no greater than that for a misdemeanor. Hence a discrimination against him and second offenders. Also that in the ordinary criminal proceedings wherein the punishment is imprisonment in the state penitentiary the defendant has the right of trial by jury, while under said section 7605, he is so imprisoned without a jury trial.

It will be noticed that the discrimination, if any there be, relates not to any individual, person, or class of persons, but to the crime itself. Mar-

kuson has the same right under said statutes as 153
any other citizen in the state of North Dakota. Any one guilty of the second offense of contempt of court under said section will receive exactly the same punishment. All citizens of the state and citizens of the United States within the state, are exactly on the same footing and treated alike under said section. It operates alike and equally 154
upon all persons under like and similar conditions and circumstances. Hence there is no discrimination and can be no discrimination as to persons or classes. It may be contended that a certain number of persons in North Dakota, interested in the sale of intoxicating liquors in violation of the state laws, are the ones 155
who will violate such injunctional orders. That such persons constitute a "class" and have rights as a "class" and therefore entitled to equal privileges with others. There is and can be no such class as liquor dealers and sellers in the State of North Dakota, for such business is prohibited by 156
the constitution and statutes. The sale of intoxicating liquor is a crime. Criminals have no rights, privileges or immunities, as a "class." From the standpoint of law there is and can be no "class of criminals." The term "class" in the matter of "class legislation" refers to some distinction or basis of classification existing in har-

157 mony with law, sanctioned and permitted by it and not in violation of law. Otherwise the violaters of law would claim privileges and immunities under the law because they do violate it. This is not the meaning of the language used in the 14th amendment of the constitution of the United States.

158 It is not designed to protect classes of criminals or criminals as a class, but persons and classes of persons, classified on a basis of law and right, and not on crime. Criminals cannot secure rights out of crime itself. Rights are based on right doing and not on wrong doing.

159 In the case of Hayes vs. Missouri, 120 U. S. 68; 7 Sup. Ct. Rep. 350, the court says: "The 14th amendment of the constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate.
160 It merely requires that all persons subjected to such legislation shall be treated alike under all circumstances and conditions, both in privileges conferred and in the liabilities imposed. As we said in Barbier vs. Connolly, speaking of the 14th amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation, which in carrying out a public

purpose, is limited in its application, if within the 161
sphere of its operation it affects alike all persons similarly situated is not within the amendment.' "

Barbier vs. Connolly, 113 U. S. 27; 5 Sup. Ct. Rep. 357;

In Pace vs. Alabama, 106 U. S. 583; 1 Sup. Ct. Rep. 637, it was held by this court that section 162
4189 of the code of Alabama punishing adultery or fornication committed by a white person and negro with each other more severely than the same offense committed between persons of the same race and color is punished by the same code does not make a discrimination against colored persons in the punishment designated which con- 163
flicts with the clause of the 14th amendment prohibiting a state from denying any person within its jurisdiction the equal protection of the laws, for section 4189 applies the same punishment to both offenders, the white and black. The discrimination in the punishment prescribed is 164
directed against the offense designated and not against the person of any particular color or race.

This case is directly in point with the case at bar. It seems clearly decisive of the objection raised by the appellant. A discrimination which is directed to the offense does not come within the amendment.

165 And again, quoting the language of Mr. Justice Harlan in Fielden vs. Illinois, 143 U. S. 452; 12 Sup. Ct. Rep. 528, "We take, as is our duty, the law of Illinois to be, as declared by its highest court, that amendments of a record of a court, in derogation of its final judgment, are not permitted in the state, after the expiration of the
166 term at which the judgment was rendered. That law is applicable to all persons within the jurisdiction of the state; and its enforcement against the plaintiff in error, cannot, therefore, be said to be a denial to him by the state of the equal protection of the laws. Neither discussion or citation of authorities is required to support a
167 proposition so manifestly correct."

In the very recent case of Tinsley vs. Andersen, supra, this same proposition was sustained. Tinsley was committed for contempt of court by a Texas state court. He claimed to be restrained of his liberty in violation of the 14th amendment
168 of the federal constitution. Says Mr. Chief Justice Fuller: "The right to the equal protection of the laws was certainly not denied, for it is apparent that the same law or course of proceedure which was applied to Tinsley would have been applied to any other person in the state of Texas under similar circumstances and conditions;"

And in re Krug, 79 Fed. 308, it is held, "That 169
a statute which prescribes a particular form of indictment as to a particular offense, does not deprive one who commits that offense of the equal protection of the laws, the statute being equal and uniform in its operations as to all who come within its scope."

170

And whenever the law operates alike on all persons and property, similarly situated, equal protection of the laws cannot be said to be denied.

Lowe vs. State of Kansas, supra.

Duncan vs. State, 152 U. S. 377, 14 Sup. Ct. Rep. 570;

People vs. Coon (67 Hun. 523), 22 N. Y. 171
S. 865;

State vs. Burgdorfer, 17 S. W. Rep. 647 (Mo.)

State vs. Kingsley, 18 S. W. Rep. 994 (Mo.);

State ex. rel. Goodsil vs. Woodmansee (N. D.); 46 N. W. Rep. 970;

172

In re. Mullholland 32 Pac. Rep. 568 (Cal.);

Missouri vs. Lewis, 101 U. S. 22;

R. R. Co. vs. Richmond, 96 U. S. 529;

Missouri Pac. R. R. Co. vs. Mackey, 127 U. S. 205; 8 Sup. Ct. Rep. 116;

Minneapolis & St. Louis R. R. Co. vs. Herrick, 127 U. S. 210, 8 Sup. Ct. Rep. 1176;

173 Soon Hing vs. Crowley, 113 U. S. 703, 5 Sup. Ct. Rep. 730;

Walston vs. Nevin, 128 U. S. 562; 9 Sup. Ct. 113.

Counsel further argues that the offense of contempt of court as designated in said section 7605
174 is the same offense as any other contempt of court in other proceedings under state statutes. That all offenses of contempt of court under the state laws are the same offenses. That appellant is imprisoned in the state penitentiary for one year while his fellow citizen who commits the same offense, to-wit: contempt of court in another pro-
175 ceeding, is punished less. We challenge the correctness of his proposition. Contempt of court under said section is no more the same offense than murder in the first degree is the same offense as manslaughter, or that grand larceny is the same offense as petit larceny. The legislature
176 has the right to fix and grade the punishments for different offenses. Reasoning from the standpoint that the court is bound to follow said section 7605 in fixing the punishment, which is not necessary under the decision of the supreme court of the state, the legislature has as much right to grade and fix the punishment for offenses of contempt of court as for any other offenses against

the state. The provision under the 14th amend- 177
ment is satisfied when all persons guilty of exactly the same offenses are punished alike. When all persons charged with the same offenses shall have the same rights of being heard. When the law operates exactly alike upon all who violate it or come under its influence.

178

It is certainly a more serious offense to violate a written order of court, than to speak of it disrespectfully in the heat of passion. It is a more serious offense to violate an order of court affecting the rights and the welfare of the people, than to violate one affecting simply private interests. And unquestionably, when one twice, wilfully 179
and deliberately, violates an order of court, pertaining to the same matter, it constitutes such a defiance of law and the authority of the court, as to warrant severe punishment. For this reason, the legislature and the courts have a right to fix and grade the punishments commensurate with the nature and gravity of the offense. If such 180
legislation be considered unwise or unequal its correction must be sought through the legislature and not in this court.

Waltson vs. Nevin, supra.

It is further claimed by counsel for appellant that the proceedings under said section 7605 are

181 in fact but a substitute for prosecutions by jury. That the legislature has sought to do that indirectly which it cannot do directly. That it substitutes trial by injunction for trial by jury. This contention cannot prevail. The violation of an injunction cannot relate to any act prior to its issue or service. If the accused had violated the
182 law as to intoxicating liquors before the issue of the injunction he has a right under the state laws to be tried by jury. The injunction does not cover it. It cannot therefore be a substitute.

This court says: In re Debs. "A court enforcing obedience to its orders by proceedings for
183 contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudgod them entitled to."

And again, "That the penalty for violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in
184 the course of such violations."

Furthermore, under the decision of this court in the case of Missouri vs. Lewis, supra, the State of North Dakota has the right, directly, to prescribe its own judicial procedure and to abolish trial by jury in all cases. Such action on the part of the state will not be in conflict with the constitution of the United States as long as all

citizens are treated alike under similar circum- 185
stances and conditions.

Walker vs. Sauvinet, supra;
Edwards vs. Elliott, 21 Wall. 532;
Pearson vs. Yeadall, 95 U. S. 294;
Ex Parte Converse, supra;
Cooley Constitutional Limitations, Fifth 186
Ed. 26.

The objection that inasmuch as said section 7605 provides one kind of procedure for violations of injunctions issued under it and the other statutes a somewhat different procedure for other contempts, and that appellant did not receive the equal protection of the laws by being tried and 187
convicted pursuant to the provisions of said section, has been answered by the decisions of this court already cited. As long as the procedure under said section operates alike upon all who come within the its scope it does not violate the constitutional guaranty of equal protection under 188
the 14th amendment.

Iowa Cent. Co. vs. Iowa, 160 U. S. 389,
16 Sup. Ct. Rep. 344.

The objection presents no federal question. The legislature has the constitutional right to establish the procedure and fix the punishment in

189 all offenses against the state. It matters not whether all offenses are tried by the same form of action, or whether each offense has its own form of action. If the procedure gives notice and an opportunity for defense and operates alike on all, under like conditions, the requirement under the federal constitution is not violated.

190

In conclusion we assert with great confidence that the conviction of appellant Markuson is not in violation of the constitution or laws of the United States; that he was duly tried and sentenced under and pursuant to the laws of the State of North Dakota, and that such conviction
191 was by due process of law, the law of the land and of his domicile; that he enjoyed the same privileges and received the same protection as all others under similar circumstances and conditions; that he received the same punisnment that others would for the same offense; that he was confronted with all of the witnesses against him,
192 pleaded to the information and voluntarily testified in his own behalf.

Every right and privilege secured to him by the constitution of the United States and the established principles of justice were extended to him. His trial, conviction and sentence are in harmony with the requirements of the constitu-

tion of the state and of the United States, in line 193
with the well settled principles of right and procedure and sustained, in analogy, by many decisions of this honorable court.

In view of the premises we beg to submit to this honorable court, that the decision of the lower court be affirmed and that the State of 194
North Dakota be permitted to enforce the just judgment of her courts.

Respectfully submitted,

EDWARD WINTERER,

State's Attorney and Attorney for Respondent.

No. 77.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 77.

NORMAN MARKUSON, APPELLANT,

vs.

N. F. BOUCHER, WARDEN, &c.

Extract from Revised Codes of North Dakota, 1895.

Sec. 13, c. 110, 1890, am'd.

SEC. 7605. PLACE OF SALES A NUISANCE—TO BE ABATED—LIQUORS DESTROYED—PRESUMPTIONS—PROCESS—PROCEDURE—PENALTIES.—All places where intoxicating liquors are sold, bartered, or given away, in violation of any of the provisions of this chapter, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of this chapter, are hereby declared to be common nuisances; and if the existence of such nuisance is established, either in a criminal or equitable action, upon the judgment of a court or judge having jurisdiction, finding such place to be a nuisance, the sheriff, his deputy, or under sheriff or any constable of the proper county or marshal of any city where the same is located

shall be directed to shut up and abate such place, by taking possession thereof, if he has not already done so, under the provisions of this chapter, and by taking possession of all such intoxicating liquors found therein together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining such nuisance, and such personal property so taken possession shall, after judgment, be forthwith publicly destroyed by such officer, and the owner or keeper thereof shall, upon conviction be adjudged guilty of maintaining a common nuisance, and shall for the first offense be punished by a fine of not less than two hundred nor more than one thousand dollars, and by imprisonment in the county jail not less than ninety days nor more than one year, and for the second and every successive offense be punished by imprisonment in the penitentiary not exceeding two years and not less than one; and said officer abating such nuisance shall securely close said building, erection or place where such nuisance was located, as against the use or occupation of the same for saloon purposes and keep the same securely closed for the period of one year (unless sooner released as hereinafter provided), and any person breaking open said building, erection or place or using the premises so ordered to be closed, shall be punished for contempt as hereinafter provided, in case of violation of injunctions; provided, however, that when leasehold premises are adjudged to be a nuisance, the owner thereof shall have the right to terminate the lease, by giving three days' notice thereof, in writing, to the tenant, and when this is done, the premises shall be turned over to the owner upon the order of the court or judge. But the release of the property shall be upon condition that the nuisance shall not be continued, and the return of the property shall not release any lien upon said property occasioned by any prosecution of the tenant. If the owner appears and pays all costs of the proceedings and files a bond with sureties to be approved by the clerk in the full value of the property to be ascertained, by the

court or judge, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within the period of one year thereafter, the court, or in vacation the judge may, if satisfied of his good faith, order the premises taken and closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property, and if the proceeding is an action in equity and bond is given and cost therein paid before judgment and order of abatement the action shall be thereby abated; provided, however, that the release of the property under the provisions of this section shall not release it from any judgment, lien or penalty or liability to which it may be subject under any other statute or law.

The attorney general, his assistant, State's attorney, or any citizen of the county where such nuisance exists or is kept or is maintained, may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action in the usual manner of granting injunctions, except that the affidavit or complaint or both, may be made by the State's attorney, attorney general or his assistant, upon information and belief; and no bond shall be required; and if an affidavit shall be presented to the court or judge, stating or showing that intoxicating liquor, particularly describing the same, is kept for sale, or is sold, bartered or given away, on the premises, particularly describing the same, where said nuisance is located, contrary to law, the court or judge must at the time of granting the injunction issue his warrant commanding the officer serving said writ of injunction, at the time of such service to search diligently the premises and carefully invoice all the articles found therein, used in or about the carrying on of the unlawful business, for which search and invoicing said officer shall receive the sum of ten dollars in addition to the fees now allowed by law for serving an injunction. If

such officer upon such search shall find upon such premises any intoxicating liquor or liquors of any kind he shall take the same into his custody and securely hold the same to abide the final judgment in the action (the expenses for such holding to be taxed as part of the costs in the action); and such officer shall also take and hold possession of all personal property found on such premises, and shall take and hold possession of such premises and keep the same closed until such final judgment.

The finding of such intoxicating liquor or liquors on such premises shall be *prima facie* evidence of the existence of the nuisance complained of. Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt for the first offense by a fine of not less than two hundred nor more than one thousand dollars, and by imprisonment in the county jail not less than ninety days nor more than one year, and for the second and every successive offense of contempt by imprisonment in the penitentiary not exceeding two years and not less than one in the discretion of the court or judge thereof. In case judgment is rendered in favor of the plaintiff in any action, brought under the provisions of this section, the court or judge rendering the same shall also render judgment for a reasonable attorney's fee in such action in favor of the plaintiff and against the defendants therein; which attorney's fee shall be taxed and collected as other costs therein, and when collected paid to the attorney or attorneys of the plaintiff therein; provided, if such attorney is the State's attorney such attorney's fee shall be paid into the county treasury as in section 7603 provided. In contempt proceedings arising out of the violation of any injunction granted under the provisions of this chapter the court, or in vacation the judge thereof, shall have the power to try summarily and punish the party or parties guilty as required by law. Process shall run in the name of the State of North

Dakota. The affidavits upon which the attachment for contempt issues shall make a *prima facie* case for the State.

The accused may plead in the same manner as to an information or indictment, in so far as the same is applicable; evidence may be oral or in the form of affidavits, or both; the defendant may be required to make answer to interrogatories, either written or oral as in the discretion of the court or judge may seem proper; the defendant shall not necessarily be discharged upon his denial of the facts stated in the moving papers, the clerk of the court shall upon the application of either party, issue subpœnas for witnesses, and except as above set forth, the practice in such contempt proceedings, shall conform as nearly as may be to that adopted by the ninetieth rule of the Supreme Court of the United States for proceedings in equity in the circuit courts.

(N. B.—Section 7605 of the Revised Codes of the State of North Dakota is identical with section 13 of chapter 110 of the General Laws of 1890 of the State of North Dakota, to which reference is made.)

MARKUSON *v.* BOUCHER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

No. 77. Argued and submitted October 27, 1899. — Decided November 20, 1899.

It is again held that judgments of the state courts in criminal cases should not be reviewed by Federal courts through writs of *habeas corpus*, but the proper remedy in such case, when it is claimed that some right under the Constitution of the United States has been denied the person convicted, is by writ of error.

THE statement of the case is in the opinion.

Mr. C. D. O'Brien for appellant submitted on his brief.

Mr. Edward Winterer for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

On the 3d of January, 1898, the appellant presented a petition to the United States District Court for the District of North Dakota for a writ of *habeas corpus*. It alleged that the petitioner was confined, and had been since the 7th of December, 1897, in the state penitentiary of North Dakota, under and in pursuance of a "certain pretended commitment" issued by the district court of the fifth judicial district of the State, in and for the county of Barnes, upon a "pretended judgment and sentence" of said court in certain proceedings therein instituted on the relation of the assistant attorney general of the State, and by the terms of said judgment and sentence the petitioner was sentenced to be imprisoned in said state penitentiary for one year.

That petitioner appealed to the Supreme Court of the State, which court affirmed "in all things the said judgment, conviction and sentence," whereupon he was confined as aforesaid. That the proceedings "were had and carried on" under and pursuant to the provisions of section 7605 of the Revised Statutes of the State, and of other statutes of the State.

The petition further alleged that the said statutes violated the fifth and sixth articles of the Amendments of the Constitution of the United States, and article 1 of the Fourteenth Amendment, in that they (the statutes) provide for the charging of a citizen with an infamous crime and compel him to answer and be punished therefor without a presentment and indictment of a grand jury; and deprive in a criminal prosecution the right of a trial by an impartial jury of the State and district wherein the crime was committed, and permit a conviction of one accused of crime without being confronted with the witnesses against him; and operate to abridge the privileges and immunities of citizens of the United States and deprive them of liberty and property without due process of law and the equal protection of the laws, in that they provide that in prosecutions thereunder a conviction for the contempt of court may be had without a trial by jury, whereas in all other criminal prosecutions persons accused are entitled to a jury trial; and further, in that under such proceedings a contempt of court is punishable as an infamous crime, whereas in all other proceedings a contempt of court is punishable as a misdemeanor.

Petitioner further alleged that he was in "straightened circumstances, and without means or power to prosecute a writ of error from the Supreme Court of the State to the Supreme Court of the United States, or to employ counsel to present or argue it there, and is informed and believes if he had such means it could not be brought on for hearing before the expiration of his sentence."

A writ of *habeas corpus* was prayed for and issued. On return and hearing it was discharged, and the petitioner remanded to custody. From the order remanding this appeal was prosecuted, and the petitioner was admitted to bail to await the decision of the appeal.

In the brief of appellant's counsel, and also in that of the attorney general of the State, as well as in oral argument, the constitutional points raised were argued at length. We are not disposed to consider them. We have frequently pronounced against the review by *habeas corpus* of the judg-

ments of the state courts in criminal cases, because some right under the Constitution of the United States was alleged to have been denied the person convicted, and have repeatedly decided the proper remedy was by writ of error.

It is not necessary to review the cases or to repeat or justify their reasoning. We lately stated the rule and the reasons for it in the cases of *Baker* v. *Grice*, 169 U. S. 284, and in *Tinsley* v. *Anderson*, 171 U. S. 101, 104. In the latter, passing on an appeal from judgment dismissing a writ of *habeas corpus*, the Chief Justice said: "The dismissal by the Circuit Court of the United States of its own writ of *habeas corpus* was in accordance with the rule, repeatedly laid down by this court, that the Circuit Courts of the United States, while they have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a State in violation of the Constitution, a law or a treaty of the United States, yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person in advance of a final determination of his case in the courts of the State, and, even after such final determination, will leave him to his remedy to review it by writ of error from this court. *Ex parte Royall*, 117 U. S. 241; *Ex parte Fonda*, 117 U. S. 516; *In re Frederick*, 149 U. S. 70; *Pepke* v. *Cronan*, 155 U. S. 100; *Bergemann* v. *Backer*, 157 U. S. 655; *Whitten* v. *Tomlinson*, 160 U. S. 231; *Baker* v. *Grice*, 169 U. S. 284."

In *Baker* v. *Grice*, Mr. Justice Peckham said: "Instead of discharging they [the Federal courts] will leave the prisoner to be dealt with by the courts of the State; that after a final determination of the case by the state court, the Federal courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state

courts of an indictment found under the laws of a State be finally prevented."

The jurisdiction is more delicate, the reason against its exercise stronger, when a single judge is invoked to reverse the decision of the highest court of a State in which the constitutional rights of a prisoner could have been claimed and may be were rightly decided, or if not rightly decided, could be reviewed and redressed by a writ of error from this court.

The case at bar presents no circumstances to justify a departure from the rule or to relieve from the application of its reasons. Nor does the question arise what right appellant would have had to petition relief from the District Court if his remedies against the judgment of the state court had ceased to exist.

Judgment affirmed.